

**Protecting the rights and welfare of the African child: An assessment  
of the contribution of the African Charter on the Rights and Welfare  
of the Child**

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A dissertation submitted to the School of Law in partial fulfilment of the requirements  
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## **Declaration**

This dissertation is my own, original work undertaken in partial fulfilment of the degree of Doctor of Philosophy of the University of London. I have made no use of sources, materials or assistance other than those which have been openly and fully acknowledged in the text.

**Thoko Kaime**

15 February 2007

## **Protecting the rights and welfare of the African child: An assessment of the contribution of the African Charter on the Rights and Welfare of the Child**

### **Abstract**

This thesis looks at the protection of children's rights in Africa through an examination of the provisions of the African Charter on the Rights and Welfare of the Child. It seeks to investigate the specific question whether the African Children's Charter provides a culturally appropriate framework for the protection and promotion of children's rights in Africa. In examining this question, the thesis argues that the effective protection of the rights of the child in Africa will not be achieved unless the substantive protections are perceived as culturally legitimate by local communities and unless the implementation procedures are aimed at enhancing such legitimacy as opposed to merely ensuring adherence to form.

The thesis tackles the question by first locating children's rights, generally; and the African Children's Charter, in particular; within the general universalism-relativism debate whilst highlighting the importance of having regard to local values in the implementation of international children's rights standards. The thesis then proceeds to analytically engage the Charter's substantive provisions through a consideration of its central themes which include principles relating to childhood, children's rights, non-discrimination, best interests, survival and development, and participation. This analysis is achieved through a combination of legal interpretation of the text as well as through a consideration of field data drawn from Malawi.

The thesis then analyses the implementation strategies envisaged under the Charter and considers how relevant the mechanisms provided are for ensuring the increased acceptance of children's rights within African communities. Whilst paying particular regard to the formal implementation requirements, the thesis also engages with less formal measures of implementation and amplifies the crucial role that non-state actors have in the realisation of children's rights in Africa.



The thesis concludes that the African Children's Charter is an important step in the realisation of the rights of the child in Africa. It further observes that in devising their implementation strategies for children's rights, African governments must learn from and be guided by appropriate local values instead of merely cloning statements from international texts.

## Acknowledgements

During the writing of this thesis, I have been moved and blessed by the generosity and kindness of many people and I wish to express my gratitude to all of them. In particular, I wish to thank my supervisor, Dr Fareda Banda. She has been my teacher, my mentor, my mother and my friend. Ma, I could bring you flowers for a season, and another and another but I still could never thank you enough.

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## **Dedication**

I dedicate this thesis to my parents, Eckson and Harriet Annette Kaime. With thanks and love – always.

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# Chapter 1

## Introduction

### 1 The question

This thesis is an investigation into the question whether the substantive and procedural provisions of the African Charter on the Rights and Welfare of the Child (the African Children's Charter' or 'the Charter')<sup>1</sup> provide a culturally legitimate framework for the promotion and protection of children's rights in Africa. In examining this question, the thesis argues that the effective promotion and protection of the rights of the child in Africa will not be achieved unless the substantive protections are perceived as culturally legitimate by local communities and unless the implementation procedures are aimed at enhancing such legitimacy as opposed to merely ensuring mechanistic adherence to form. In the context of this thesis cultural legitimacy denotes the quality of being in conformity with the accepted principles or rules and standards of a particular culture. The defining characteristic of cultural legitimacy is the authority and reverence derived from internal validity.<sup>2</sup> A culturally legitimate norm, rule or value is respected and observed by members of the particular culture, presumably because it is assumed to bring benefits to the members of that particular culture. The corollary of this is that a rule or norm which does not command adequate legitimacy will not enjoy sufficient observance or support.

### 2 The methodology

In tackling this question, the thesis relies on a combination of library-based as well as socio-legal methodologies. The blending of these approaches is in recognition of the fact that the African Children's Charter is not only an important part of the ever-

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<sup>1</sup> African Charter on the Rights and Welfare of the Child, adopted July 1990 (entered into force 29 November 1999) OAU Doc.CAB/LEG/24.9/49 (1990).

<sup>2</sup> See AA An'Naim 'Problems of universal cultural legitimacy for human rights' in AA An'Naim & FM Deng (eds) *Human rights in Africa: Cross-cultural perspectives* (Washington D.C.: Brookings Institution, 1990) at pp 331, 336.

evolving international human rights paradigm but also that it is a crucial rule-focused rendition of the situation of African children. Consequently, an approach that relies on both methodologies will enable the presentation context-based analysis of the cultural legitimacy of the Charter's propositions.

### 3 Motivation for the thesis

Two main reasons encouraged me to write this thesis. The first is the absence of a comprehensive analysis on the rights and welfare of the African child based on the principles expounded in Africa's own instrument on the subject. The second is the African Children's Charter's insistence that the virtues of African cultural heritage, historical background and the values of the African civilization should inspire and characterise the concept of the rights and welfare of the child.<sup>3</sup> This focus on African values and cultural heritage makes the Charter an appropriate starting place for any discussion on the cultural legitimacy of children's rights within African communities.

### 4 Background

After almost a decade of preparatory work the United Nations ('the UN') adopted in 1989 the Convention on the Rights of the Child ('the Convention' or 'the CRC').<sup>4</sup> Amongst the human rights instruments that make up the UN human rights system, the CRC stands unique. Never before has a human rights instrument promoted under the auspices of the UN had so many states participate at the signing ceremony.<sup>5</sup> Never before has a human rights treaty gone into force within months after the UN General Assembly had adopted it;<sup>6</sup> and never before has a human rights instrument received

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<sup>3</sup> African Children's Charter, preamble, para. 6.

<sup>4</sup> Convention on the Rights of the Child, adopted 20 November 1989 (entered into force 2 September 1990) GA Res. 44/25 (1989), UN Doc. A/RES/44/25 (1989). Text also available in 28 *International Legal Materials* (1989) 1448 and 29 *International Legal Materials* (1990) 1340

<sup>5</sup> A record 60 states participated in the signing ceremony of the CRC. See C Price Cohen 'The rights of the child: Implications for change in the care and protection of refugee children' (1996) 3 *International Journal of Refugee Law* p 675 at p 676.

<sup>6</sup> The CRC went into force less than nine months after its adoption. See n 4 above.

near-universal ratification.<sup>7</sup> This overwhelming normative consensus affirms a shared and welcome global recognition of the rights of the child.<sup>8</sup> It indicates increasing support and acceptance by the world community of the need to promote and protect the rights of the child.<sup>9</sup> Furthermore, the adoption of the Convention represents an acceptance on the part of the world community that the rights of certain categories of people are best protected in a single instrument designed for that purpose.<sup>10</sup>

Significantly though, the universal ratification of the CRC has not precluded attempts to temper the implementation of children's rights with the particular socio-cultural experiences of the diverse societies which have subscribed to its normative framework.<sup>11</sup> The call for this 'culturalisation' has been justified by reference to the economic, social, cultural and political diversity that characterises the community of states.<sup>12</sup> There are regions with varying religious beliefs, social systems and economic

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<sup>7</sup> The CRC has been ratified by every state in the world except Somalia and the United States of America. See Office of the United Nations High Commissioner for Human Rights 'Status of ratifications of the principal international human rights treaties' available at <<http://www.ohchr.org/english/countries/ratification/11.htm>> (accessed on 22 December 2006).

<sup>8</sup> B Rwezaura 'The concept of the child's best interests in the changing economic and social context of sub-Saharan Africa' in P Alston (ed) *Best interests of the child: Reconciling culture and human rights*, (Oxford: Oxford University Press, 1994) p 80 at p 82.

<sup>9</sup> B Rwezaura 'Law, culture and children's rights in eastern and southern Africa' in W Ncube (ed) *Law, culture, tradition and children's rights in eastern and southern Africa*, (Aldershot, Brookfield USA, Singapore, Sydney: Ashgate; Dartmouth, 1998) p 289; MS Pais (1999) 'A human rights conceptual framework for UNICEF' *Innocenti essays* no. 9. at p 5.

<sup>10</sup> B Rwezaura n 8 above at p 82.

<sup>11</sup> See A Armstrong *et al* 'Towards a cultural understanding of the interplay between children's and women's rights: An eastern and southern African perspective' (1995) 3 *International Journal of Children's Rights* pp 333-368 where the authors 'investigate and develop a framework within which the applicability of certain key provisions of the [CRC] may be analysed within the cultural context of eastern and southern Africa.' See also Rwezaura n 9 above; Bonny Ibhawoh 'Between culture and constitution: Evaluating the cultural legitimacy of human rights in the African state' (2000) 22 *Human Rights Quarterly* p 838 at p 839.

<sup>12</sup> See B Rwezaura n 8 above p 83 noting that '...the international community is very diverse. It is neither homogeneous politically, culturally, nor economically.' See also F Viljoen 'The African Charter on the Rights and Welfare of the Child' in CJ Davel (ed) *Introduction to child*



organisation. These factors make it impossible for states, and even communities within a single state, to have a common conception and understanding of the normative prescriptions set out by the CRC.<sup>13</sup> In this regard, it has been argued that an approach which is sympathetic to these differences infuses cultural legitimacy and therefore efficacy to the whole enterprise of children's rights.<sup>14</sup>

It is important to note that in the context of Africa, an approach which takes into account local factors is indeed critical because children's rights seem not to enjoy sufficient cultural legitimacy within the various African cultures and respect for children's rights is yet to firmly gain ground.<sup>15</sup> This state of affairs is due to a battery of reasons which include the fact that African did not take a prominent role in the processes leading to the present international framework for the rights of the child.<sup>16</sup> Consequently, the international norms respecting the promotion and protection of children's rights are heavily steeped in 'western' rights ideology and lack a meaningful African contribution.<sup>17</sup> The lack of sufficient support may also be ascribed to the fact that international human rights norms in general,<sup>18</sup> and children's rights in

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*law in South Africa* (Landsdowne: Juta, 2000) p 214 at p 218 noting that the CRC failed to address some issues which were particular for Africa due to the need for consensus.

<sup>13</sup> B Rwezaura n 8 above at p 83.

<sup>14</sup> See generally the essays collected in P Alston, P (ed) *Best interests of the child: Reconciling culture and human rights* (Oxford: Oxford University Press, 1994).

<sup>15</sup> See generally the essays collected in W Ncube (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa*, (Sydney: Ashgate, 1998) where the authors describe some resilient cultural practices that imperil the rights of the child.

<sup>16</sup> See AA An-Naim n 2 above at pp 346-353.

<sup>17</sup> See TW Bennett *Human rights and African customary law under the South African Constitution* (Cape Town: Juta & Co, 1999) at p 98 noting that children's rights in international law have a decidedly western slant.

<sup>18</sup> See generally, J Silk 'Traditional culture and the prospect for human rights in Africa' AA An-Naim & FM Deng (1990) at p 290.

particular,<sup>19</sup> suppress or do not acknowledge African traditional values and conceptions of human rights.<sup>20</sup>

Consequently, the desire for the culturalisation of children's rights has led to calls for a regime of children's rights not only founded upon the CRC but also reflective of and informed by African cultural values and heritage.<sup>21</sup> This approach decries the trumping of traditional African practices in favour of practices and ideologies perceived or described as non-African. Instead, it is suggested that inspiration be sought from African cultural heritage, historical background and the values of African civilisation.

It is this ideological and philosophical posturing that motivated the adoption of the African Children's Charter by African states. The Charter, which so far has been ratified by 39 out of Africa's 54 states,<sup>22</sup> is intended to take into account of the economic, social, political, cultural and historical experience of African children<sup>23</sup> and

<sup>19</sup> See generally L Muthoga 'Analysis of international instruments for the protection of the rights of the child' in Community Law Centre (ed) *International conference on the rights of the child: Papers and reports of a conference convened by the Community Law Centre* (Cape Town: Community Law Centre, 1992) at p 123

<sup>20</sup> For instance, Donnelly and Howard, have argued that the concept of human rights is alien to African societies. J Donnelly 'Human rights and human dignity: An analytical critique of non-western conceptions of human rights' (1982) 76 *American Political Science Review* p 303; J Donnelly *Universal human rights in theory and practice* (Ithaca: Cornell University, 1989) p 119; R Howard 'Evaluating human rights in Africa: Some problems of implicit comparisons' (1984) 6 *Human Rights Quarterly* p 160 at p 176; R Howard 'Universal human rights' (2001) available at <<http://www.chrf.ca/english/programmes-eng/files/ihr/22nd-session/universal-hr.pdf>> at p 81 (accessed on 22 February 2004); RE Howard 'Cultural absolutism and the nostalgia for community' (1993) 15 *Human Rights Quarterly* p 315; M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* p 339 at p 354; AS Preis 'Human rights as cultural practice: An anthropological critique' (1995) 18 *Human Rights Quarterly* p 286.

<sup>21</sup> See L Muthoga n 19 above. See also F Viljoen n 12 above at pp 218-219.

<sup>22</sup> Union Africaine 'Liste des pays qui ont signe, ratifie/adhere convention del l'union a africaine sur la charte africaine des droits et du bien-etre de l'enfant' available at <<http://www.africa-union.org/root/AU/Documents/Treaties/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf>> (accessed on 22 December 2006).

<sup>23</sup> See African Children's Charter, preamble para 3.

thereby provide a distinctively African framework for the protection and promotion of children's rights.<sup>24</sup> However, the promulgation of a list of rules on the rights and welfare of the African child is only the first step. In order to ensure that African boys and girls across the continent enjoy the Charter's prescriptions, it is important to ensure that those particular rights enjoy sufficient cultural support in the communities within which the children live. Consequently, it is worthwhile to develop analyses that examine the transition of these prescriptions from paper into the lived reality of African children.

## 5 Significance of the study

The African Children's Charter has now been ratified by 39 African states<sup>25</sup> meaning that it has now become a key document within the African human rights system. Additionally, the African Committee on the Rights and Welfare of the Child has just been appointed under article 32 of the African Children's Charter<sup>26</sup> with the mandate, amongst others, to develop the principles contained in the Charter.<sup>27</sup> Given the

<sup>24</sup> See African Children's Charter, preamble para 6, which declares that the virtues of African cultural heritage, historical background and the values of African civilisation should inspire and characterise the conception of the rights and welfare of the child.

<sup>25</sup> Union Africaine 'Liste des pays qui ont signe, ratifie/adhere convention del l'union africaine sur la charte africaine des droits et du bien-etre de l'enfant' available at <<http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf>> (accessed on 22 December 2006).

<sup>26</sup> Article 32 provides:

An African Committee of Experts on the Rights and Welfare of the Child hereinafter called 'the Committee' shall be established within the Organization of African Unity to promote and protect the rights and welfare of the child.

<sup>27</sup> African Children's Charter, art 42 provides:

The functions of the Committee shall be:

(a) To promote and protect the rights enshrined in this Charter and in particular to:

- (i) collect and document information, commission inter-disciplinary assessment of situations on African problems in the fields of the rights and welfare of the child, organize meetings, encourage national and local institutions concerned with the rights and welfare of the child, and where necessary give its views and make recommendations to Governments;
- (ii) formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa;
- (iii) cooperate with other African, international and regional Institutions and organizations concerned with the promotion and protection of the rights and welfare of the child.

(b) To monitor the implementation and ensure protection of the rights enshrined in this Charter.

Charter's emphasis on African traditions and values, there is a need for a proper conceptual framework for elaborating children's rights within the African cultural context. This study will attempt to elucidate such a framework and contribute to the developing jurisprudence on the rights and welfare of the child.

Further, human rights in general, and children's rights in particular are gaining ground within African constitutions and legislation.<sup>28</sup> With the introduction of children's rights into domestic legal systems, there is a high likelihood of conflict between those who favour a 'traditionalist' approach to child upbringing on the one hand, and human rights activists on the other. Consequently, there is need for a coherent analytical framework for resolving this conflict and this study is intended to contribute towards such initiative.

Further, African children suffer a lot from deleterious cultural practices and notions which enjoy more legitimacy than international children rights norms. It is, therefore, critical to develop a conceptual framework to challenge, re-evaluate, reformulate and replace the legitimacy of these negative practices and values whilst at the same time maintaining the cultural integrity and identity of African societies. Whilst the Charter is a critical milestone in this endeavour, there is still a real need to elucidate the standards which it lays down.

Moreover, it must be noted that the advent of globalisation constitutes a threat for both African culture and children's rights. The conflict between these two paradigms exacerbates their vulnerability to the negative effects of globalisation. Consequently, a harmonised relationship will strengthen them both against such effects and this study is intended to positively contribute towards the construction of such a harmonised relationship.

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(c) To interpret the provisions of the present Charter at the request of a State Party, an Institution of the Organization of African Unity or any other person or Institution recognized by the Organization of African Unity, or any State Party.

(d) Perform such other task as may be entrusted to it by the Assembly of Heads of State and Government, Secretary-General of the OAU and any other organs of the OAU or the United Nations.

<sup>28</sup> For example, see s.28 of the South African Constitution; the South African Children's Bill (Bill No 70 of 2003); the Kenyan Children's Act (Act No 8 of 2001) *Official Gazette*, No. 8, 1 April 2001 at pp 493-680; the Gambian Children's Act (2005).

Finally, there is no text that deals with the implementation and realisation of the rights and welfare of the child in Africa, using an African source document, in a holistic manner. It is intended that this study will be a contribution towards such endeavours.

In view of the foregoing, it is submitted that the study will constitute a significant contribution to the growing body of literature on children's rights in general and African children's rights in particular.

## **6 Scope of the thesis**

The thesis is divided into eight chapters. Chapter one is introductory and sets out the principal research question. It spells out the methodology and outlines the motivation for the thesis and outlines a brief analytical context for the study. The chapter also identifies the contribution that the thesis will make towards discourse on the rights and welfare of the child.

Chapter two is the literature review and sets the analytical context of this thesis. It identifies the structural basis of the international law of children's rights and the struggle to apply such general principles to specific situations. The chapter assesses the literature in so far as it applies to the African Children's Charter and identifies several opportunities for further research.

Chapter three is the methodology chapter and outlines as well as provides justification for the methods employed to answer the questions posed by the thesis.

Chapter four locates the African Children's Charter within the general debates regarding the universality and relativity of human rights. The chapter elaborates on the role, place and efficacy of cultural legitimacy on the promotion and protection of children's rights and demonstrates how these interlocking debates have influenced the conception and protection and protection of children's rights internationally as well as within the African human rights system. The chapter will argue for the strong recognition of universal standards but at the same time argue for the acceptance of

culturally appropriate conceptions of children's rights and demonstrate that the African Children's Charter is a solid example of such endeavours.

Chapter five introduces the beneficiaries of the African Children's Charter. It critically analyses the conception of childhood in international children's rights literature and tests this image of childhood against the reality of African children's lives. The purpose of the chapter is to draw strength from both the conception of childhood at international law and at the local level and discuss how these paradigms can both help encourage respect for the rights and welfare of the child. The chapter draws heavily on insights garnered from the fieldwork as well as international law methods.

Chapter six focuses on the core substantive provisions of the African Children's Charter. The objective here is to outline the contribution of the instrument to children's rights generally and to Africa in particular. The chapter is limited to attaining a legal understanding of the African Children's Charter's main provisions, achieving an assessment of their legal value and upraising the cultural legitimacy and appropriateness of the substantive protections. Like chapter five, chapter six also relies on socio-legal and library-based analysis.

Whilst the articulation of children's rights standards is a crucial step towards achieving their protection, it is also of utmost importance that these prescriptions be realised in fact. Consequently, chapter seven focuses on how the substantive provisions are implemented. In this regard, the chapter looks at the formal implementation mechanisms outlined in the African Children's Charter and relates these to the cultural context of children's rights. Apart from assessing their legal and technical aspects, the chapter examines the efficacy of these mechanisms in raising the legitimacy of children's rights. The chapter also investigates and critiques the possibility of engaging non-traditional institutions in children's rights implementation work. This chapter, which relies on both the text of the African Children's Charter as well as the results of fieldwork research, concludes that since the African Children's Charter does not prescribe a blueprint for the implementation of its provisions, the formal mechanisms for implementation must be complemented with other locally

developed processes and institutions aimed at raising the cultural legitimacy of children's rights.

The final chapter is a synthesis of the whole study and summarises its salient arguments. It then makes the conclusions as well as the recommendations.

## **7 Limitations of the study**

A comprehensive assessment of the African Children's Charter would necessarily have to examine in detail each and every provision of the Charter and analyse its contribution to the promotion and protection of the rights and welfare of the child. This study, however, is selective and limits its scope to an examination of general principles that underpin the Charter and to the implementation mechanisms provided for in the Charter. The rationale for this selectivity is that although the Charter's provisions cover each and every facet of a child's life, there are four principles that are so fundamental that they may be considered as crosscutting considerations which inform the nature, meaning, scope and content of each one of the other provisions of the Charter.<sup>29</sup> These principles include non-discrimination; the best interests of the child; participation and the principle of the child's survival and development. Since this study is intended to serve as a foundation for further research into the Charter's normative contribution, it submitted that an analysis of these principles serves as a proper starting point for such further research.

Another major difficulty is the non-accessibility of the documents and jurisprudence of the African Committee on the Rights and Welfare of the Child. It goes without saying that the Committee is the central body entrusted with developing jurisprudence relating to the rights and welfare of the child. Consequently, this study would benefit tremendously from the views of the Committee on the interpretation and application of the Charter. However, given the short existence of the Committee such jurisprudence is bound to be limited. Further to that, the few materials that are

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<sup>29</sup> See African Committee of Experts on the Rights and Welfare of the Child 'Guidelines for initial reports of States Parties' at para 11, available at <[http://www.africa-union.org/child/Guidelines%20for%20Initial%20reports%20\\_%20English.pdf](http://www.africa-union.org/child/Guidelines%20for%20Initial%20reports%20_%20English.pdf)> (accessed on 22 December 2006).

available are hard to access because the Committee is yet to set up its own website or launch a publication which contains its proceedings.



## Chapter 2

### Literature review

#### 1 Introduction

My inquiry into the cultural legitimacy of the African Charter on the Rights and Welfare of the Child (the African Children's Charter' or 'the Charter')<sup>1</sup> seeks to build on existing analysis on the international law on the rights of the child and on the cultural-based critiques of the international human rights paradigm generally and children's rights in particular. Consequently, this chapter makes a brief foray into these areas of discourse with the explicit purpose of identifying gaps in the analysis towards which further contribution may be made. Thus, in the following section of the chapter, I present an introduction to the general structure of children's rights at international law. This is followed, in section 3, by an examination of the culture-based critiques of the idea of universal rights. Sections 4 and 5 complement the above by offering an analysis of documents and literature that focus on the rights and welfare of the child.

#### 2 The structural basis of children's rights at international law

Efforts to make provision for a catalogue of children's rights or entitlements at the international level may be traced back to 1924 when the fifth Assembly of the League of Nations adopted the Declaration of the Rights of the Child ('the 1924 Declaration' or 'the Declaration').<sup>2</sup> The 1924 Declaration, which was also known as the Declaration of Geneva, proclaimed that 'mankind owes to the child the best it has to give'; a message that was subsequently to underline the 1959 Declaration on the

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<sup>1</sup> African Charter on the Rights and Welfare of the Child, adopted July 1990 (entered into force 29 November 1999) OAU Doc.CAB/LEG/24.9/49 (1990).

<sup>2</sup> Declaration of the Rights of the Child League of Nations Official Journal (1924); Records of the Fifth Assembly. Supplement no. 23. See generally D Hodgson 'The historical development and 'internationalisation' of the children's rights movement' (1992) *Australian Journal of Family Law* p 25.

Rights of the Child ('the 1959 Declaration')<sup>3</sup>; the 1989 Convention on the Rights of the Child ('the Convention' or 'the CRC').<sup>4</sup> as well as the African Children's Charter. In particular, the 1924 Declaration set out five principles aimed at fulfilling the rights of children. The first principle provided that '[t]he child must be given the means requisite for its normal development, both materially and spiritually.' The second provided that '[t]he child that is hungry must be fed; the child that is sick must be nursed...' The third principle espoused an element of what has come to be commonly as the 'children first principle'. It declared that '[t]he child must be the first to receive relief in times of distress.' Principles four stated that the child must be protected from all forms of exploitation whilst the fifth principle called on states to inculcate in children a spirit of service towards fellow man. The 1924 Declaration, however, was never intended to create binding obligations on states and corresponding legal rights for children. Although it was termed a Declaration of the *Rights* of the Child, the instrument emphasised the duties that men and women had in ensuring that mankind gave children the best it had got to give. In other words, children were regarded as recipients of welfare rather than holders of specific rights.

Despite this shortcoming, the 1924 Declaration is important in the development of the current children's rights framework in several ways. Firstly, it debunks the notion that the international rights of the child are a recent development in international human rights law. The League of Nations initiative took place well before efforts to codify the universal rights of all people. The Declaration also provides the groundwork for the proposition that the welfare of children could best be protected by the protection of their rights;<sup>5</sup> a proposition that has been borne out by the CRC and the African Children's Charter. Finally, the Declaration, by espousing a mixture political, social and economic aspirations; renders credence to the principle that asserts the

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<sup>3</sup> Declaration on the Rights of the Child, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp (No. 16) at 19, U.N. Doc. A/4354 (1959).

<sup>4</sup> Convention on the Rights of the Child, adopted 20 November 1989 (entered into force 2 September 1990) GA Res. 44/25 (1989), UN Doc. A/RES/44/25 (1989). Text also available in (1989) 28 *International Legal Materials* p 1448 and (1990) 29 *International Legal Materials* p 1340

<sup>5</sup> G van Bueren *The international law on the rights of the child* (Dordrecht, Boston, & London: Martinus Nijhoff Publishers, 1995) p 8.

indivisibility of rights along civil and political, on the one hand; and economic, social and cultural on the other.

A further important step in the protection of the rights and welfare of the child was taken when the General Assembly of the United Nations adopted the 1959 Declaration. The Declaration is a longer document consisting of a preamble and ten principles. The preamble to the Declaration, which makes a reference to the United Nations Charter and the Universal Declaration of Human Rights, calls upon governments to implement its provisions through 'legislative and other measures progressively taken.' The preamble reaffirms the 1924 Declaration's pledge that 'mankind owes to the child the best it has to give' and goes on to place unequivocal duties on local authorities and voluntary organisations to work towards the observance of the rights of children. Despite the focus on the rights of children and the corresponding duties on states, some of the 1959 Declaration's principles seem inconsistent with the idea of establishing legal rights. For example, principle 6 promotes what may now be considered an inappropriate view of the respective roles of fathers and mothers in a child's life. The principle states, among other things, that 'a child of tender years shall not, save in exceptional circumstances be separated from his mother.' This view would not pass muster in the current international human rights framework as it promotes a stereotypical view of mothers that hinges on discrimination. Similarly, the declaration in principle 6 that a child needs 'love and understanding'; and that children should grow in an atmosphere of 'affection and of moral and material security' would now be considered too vague to raise any legal obligations.

However, apart from these shortcomings, the 1959 Declaration represents 'the first serious attempt to describe in a reasonably detailed manner'<sup>6</sup> a catalogue of the rights of the child. In accordance with the Declaration, a child is entitled to a name and nationality,<sup>7</sup> to adequate nutrition, housing, recreation and medical services.<sup>8</sup> It also calls upon states to make special provision for the needs of physically, mentally, and

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<sup>6</sup> Jane Fortin *Children's rights and the developing law*, 2<sup>nd</sup> ed, (London: LexisNexis, 2003) p 35.

<sup>7</sup> 1959 Declaration, principle 3.

<sup>8</sup> 1959 Declaration, principle 4

socially handicapped children;<sup>9</sup> as well as those children lacking family support.<sup>10</sup> The Declaration also guarantees the child the right to education, the right to play and recreation,<sup>11</sup> and the right to be protected from neglect<sup>12</sup> and hazardous employment.<sup>13</sup> More importantly, the 1959 Declaration contained a general non-discrimination clause<sup>14</sup> and was the first international instrument to enshrine the principle that children are entitled to 'special protection' and that such protection must be implemented by reference to 'the best interests of the child' which 'shall be a paramount consideration.'<sup>15</sup>

Although the 1959 Declaration was a non-binding resolution of the General Assembly, its statement on the rights and welfare of the child set the foundation for subsequent development of the corpus of child law at the international level. It marked a break with the prior conception of children as beneficiaries of charity and developed the child as a subject of international law with the ability to enjoy the benefits of specific rights and freedoms. Indeed, in 1979, twenty years after adopting the Declaration, the General Assembly noted that:

[T]he principles of the Declaration have played a significant part in the promotion of the rights of children in the entire world as well as in shaping various forms of international cooperation in this sphere.<sup>16</sup>

Thus, it is not surprising that the 1959 Declaration's principles found their way into the next international statement on the rights and welfare of the child: the Convention on the Rights of the Child. The first draft of the Convention that was submitted by Poland to the Commission on Human Rights in 1978 in many respects resembled the 1959 Declaration. This draft was adopted by the Commission's open-ended Working Group on the Draft Convention on the Rights of the Child in 1979. After a decade of

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<sup>9</sup> 1959 Declaration, principle 5.

<sup>10</sup> 1959 Declaration, principle 6.

<sup>11</sup> 1959 Declaration, principle 7.

<sup>12</sup> 1959 Declaration, principle 9.

<sup>13</sup> As above.

<sup>14</sup> 1959 Declaration, principle 2.

<sup>15</sup> As above.

<sup>16</sup> UN GAOR, 33rd Sess., UN Doc. A/33/45.

discussion and refinement, the Working Group adopted its final report on 21 January 1989 and forwarded the report to the Commission on Human Rights for consideration and transmission to the General Assembly. The Convention was adopted unanimously by the General Assembly on 20 November 1989 and quickly came into force on 2 September 1990.

The Convention which applies to ‘every human being below the age of eighteen years’,<sup>17</sup> contains 54 articles, 40 of which makes provision for substantive rights ranging from civil and political to economic, social and cultural rights. It includes typical civil and political rights such as protection from discrimination,<sup>18</sup> right to life,<sup>19</sup> right to name and nationality,<sup>20</sup> freedom of expression,<sup>21</sup> religion,<sup>22</sup> association and assembly,<sup>23</sup> and the right to privacy.<sup>24</sup> Amongst the economic, social and cultural rights are the rights to health,<sup>25</sup> social security,<sup>26</sup> education,<sup>27</sup> and the right to play.<sup>28</sup> Additionally, the CRC has been further augmented by the adoption of two optional protocols: the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict<sup>29</sup> and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.<sup>30</sup> In a nutshell, the CRC is a very comprehensive treaty that

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<sup>17</sup> Unless the age of majority is reached earlier. See CRC, art. 1.

<sup>18</sup> CRC, art. 2.

<sup>19</sup> CRC, art. 6.

<sup>20</sup> CRC, art. 7

<sup>21</sup> CRC, art. 13.

<sup>22</sup> CRC, art. 14.

<sup>23</sup> CRC, art. 15.

<sup>24</sup> CRC, art. 16.

<sup>25</sup> CRC, art. 24.

<sup>26</sup> CRC, art. 26.

<sup>27</sup> CRC, art. 29.

<sup>28</sup> CRC, art. 31.

<sup>29</sup> Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000), *entered into force* February 12, 2002. The text is also available at <<http://www.unhcr.ch/html/menu2/6/protocolchild.htm>> (accessed on 22 December 2006).

<sup>30</sup> Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, G.A. Res. 54/263, Annex II, 54 U.N. GAOR Supp (No. 49)

makes provision for almost every aspect of a child's life. It may rightly be described as forming the core of the international law on the rights of the child.<sup>31</sup>

Given the extensive scope of the Convention, it is useful for explanatory and analytical purposes to classify the rights into categories.<sup>32</sup> In this regard, Thomas Hammaberg has suggested that the Convention may be said to be concerned with the four 'P's':<sup>33</sup> the participation of children in decisions affecting them; the protection of children from all forms of discrimination; the prevention of harm to children; and the provision of assistance for their basic needs. All these 'P's' are equally important and thus implementation efforts cannot be skewed in favour of one aspect when efforts in the other areas are lagging behind.<sup>34</sup> The Committee on the Rights of the Child, which is tasked with monitoring the implementation of the CRC by states parties has also emphasised on the interrelated nature of its provisions. Nevertheless, the Committee has elevated non-discrimination,<sup>35</sup> the child's best interests,<sup>36</sup> survival and development<sup>37</sup> and principle on participation into general principles.<sup>38</sup> Consequently, any consideration of actions, policies or interventions relating to children must be gauged with reference to these four cross-cutting principles.<sup>39</sup>

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at 6, U.N. Doc. A/54/49, Vol. III (2000), *entered into force* January 18, 2002. The text is also available at <<http://www.unhchr.ch/html/menu2/dopchild.htm>> (accessed on 22 December 2006).

<sup>31</sup> Jane Fortin describes it as 'the touchstone for children's rights throughout the world.' See Jane Fortin (2003) n 6 above, p 49.

<sup>32</sup> Jane Fortin (2003) n 6 above, p 38.

<sup>33</sup> Thomas Hammaberg (1990) 'The UN Convention on the Rights of the Child-and how to make it work' 12 *Human Rights Quarterly* p 97. See also G van Bueren n 5 above, p 15.

<sup>34</sup> G van Bueren n 5 above, p 15.

<sup>35</sup> CRC, art. 2.

<sup>36</sup> CRC, art. 3.

<sup>37</sup> CRC, art. 6

<sup>38</sup> See Office of the High Commissioner for Human Rights, Fact Sheet No. 10 (Rev 1) 'The rights of the child' available at <<http://www.unhcr.ch/html/menu6/2/fs10.htm>> (accessed 22 December 2006).

<sup>39</sup> T Kaime 'The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections' (2005) 5 *African Human Rights Law Journal* p 221 at pp 228-9.

Since it was adopted by the General Assembly in November of 1989, the CRC has taken credit for several firsts. It was the longest and most comprehensive list of human rights created for a specific group. It entered into force in record time as the quickest ratified instrument of all human rights treaties; coming into force barely nine months after its adoption. It quickly became the most ratified human rights treaty in the world; with ratifications by all the world's nations save for East Timor, Somalia and the United States of America.<sup>40</sup>

However, the enthusiasm which greeted the adoption of the CRC must be tempered with the flurry of reservations, declarations and the accompanying objections that greeted these record ratifications. No less than 70 states parties have entered reservations or declarations, some of which attempt to subject the Convention under the various religious, cultural or traditional observations current in the concerned jurisdictions. Consequently, whilst the ratification of the Convention en masse indicates a basic acceptance of the premise that the welfare of children may be best achieved by the promotion and protection of their rights; there is yet no universal consensus on the form that such protection should take. This struggle between universal ideas and the relevance of context are not peculiar to children's rights but permeate throughout human rights discourse generally.

### 3 Universal rights and the struggle for context

In 1948, the international community adopted by consensus, the Universal Declaration of Human Rights ('the UDHR' or 'the Declaration')<sup>41</sup> Almost sixty years down the road, it is still the pre-eminent document in the growing corpus of human rights instruments.<sup>42</sup> The Declaration proclaims the universality of human rights by

<sup>40</sup> As of 26 September 2006, the CRC had 192 states parties. See <<http://www.ohchr.org/english/countries/ratification/11.htm#N40>> (accessed on 22 December 2006).

<sup>41</sup> Universal Declaration of Human Rights, adopted 10 December 1948, G.A.Res 217A, UN GAOR, 3<sup>rd</sup> sess., at 71, UN Doc A/810 (1948).

<sup>42</sup> J Donnelly 'The Universal Declaration model of human rights: A liberal defense' (2001) available at <<http://www.du.edu/humanrights/workingpapers/papers/12-donnelly>> (accessed on 22 December 2006) noting that the global human rights regime is rooted in the Universal

proclaiming that it is ‘a common standard of achievement for *all peoples and all nations*.’<sup>43</sup> Consequently, since the prescriptions of the Declaration apply to every human being regardless of who or where they are, human rights are often commonly spoken of as universal rights.<sup>44</sup> As Donnelly puts it, human rights are ‘general rights that arise from no special undertaking beyond membership in the human race. To have human rights, one does not have to be anything other than be born a human being.’<sup>45</sup> Such rights are, therefore, an inherent part of one’s humanity and the claim of universal rights is that *all* human beings ought to be treated in the ways prescribed by the UDHR *everywhere*.<sup>46</sup> Howard, who is in many respects Donnelly’s ideological and philosophical counterpart, proffers the following definition:

Human rights are rights that all human beings are entitled to, merely by virtue of being human. Such rights do not have to be earned, nor are they dependent on any particular social status.<sup>47</sup>

This conception of human rights as entitlements that belong to the individual is explicitly liberal.<sup>48</sup> It originated out of the specific historic context of western Europe. Although the foundations of human rights thought may be traced to earlier thinkers and writers, the concept was given a particularly clear and forceful articulation in the

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Declaration. See also M Glen Johnson & J Symmides *The Universal Declaration of Human Rights: A history of its creation and implementation, 1948-1998* (Paris: UNESCO Publishing, 1998); G Alfredsson & A Eide (eds) *The Universal Declaration of Human Rights: A common standard of achievement* (The Hague, Boston: Martinus Nijhoff Publishers, 1995).

<sup>43</sup> UDHR, preamble.

<sup>44</sup> See generally J Donnelly *Universal human rights in theory and practice* (Ithaca: Cornell University, 1989) ch. 1 and JW Nickel *Making sense of human rights: Philosophical reflections on the Universal Declaration of Human Rights* (Berkeley: University of California Press, 1987).

<sup>45</sup> J Donnelly ‘Human rights and human dignity: An analytical critique of non-western conceptions of human rights’ (1982) 76 *American Political Science Review* p 303 at p 306.

<sup>46</sup> J Donnelly n 42 above at pp 1-3.

<sup>47</sup> R Howard ‘Universal human rights’ (2001) available at <<http://www.chrf.ca/english/programmes-eng/files/ihr/22nd-session/universal-hr.pdf>> (accessed on 22 December 2006).

<sup>48</sup> As above at p 1.



writings of 18<sup>th</sup> century thinker, John Locke through his *Treatise on government*.<sup>49</sup> Thus, taking their cue from their liberal origins, universalists maintain that every person has comprehensive and equal rights, as an individual living within human society. Whilst universalists do not deny that people from different cultures or backgrounds may be different, they insist that individual sameness, or similarity, among human beings should prevail over cultural difference when it comes to human rights.<sup>50</sup>

Those taking a relativist position on the question of human rights reject the above notions of human rights as naïve, lacking empirical validity, ahistorical and worst of all culturally imperialistic.<sup>51</sup> The relativists begin by asserting the empirical fact that historically, different societies have had different or no notions of rights. They also claim that individual rights are not God-given or self-evident as the universalists claim. Rather, they are a historical construct which developed in Europe in reaction to the social, political and economic development of those communities. Thus, argue the relativists, individual human rights are not universal but rather, particularistic western values masquerading as universal concepts.

The debate between universalists and relativists highlights the complex and often arduous task of translating legal and ethical concepts of rights between two different cultures or normative systems. A plethora of anthropological literature illustrates a great many of the dilemmas that arise from encounters between different value systems.<sup>52</sup> However, despite the initial clamour against those challenging the liberal doctrine of the universality of individual human rights, increasing awareness has emerged slowly amongst scholars as to the prevalence of significant cultural

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<sup>49</sup> See generally OM Ejidike 'Human rights in the cultural traditions and social practice of the Igbo of south-eastern Nigeria' (1999) 43 *Journal of African Law* p 71.

<sup>50</sup> LS Bell, AJ Nathan & I Peleg 'Introduction: Culture and human rights' in LS Bell, AJ Nathan & I Peleg (eds) *Negotiating culture and human rights* (Columbia University Press: New York, 2001) p 1 at p 5.

<sup>51</sup> As above.

<sup>52</sup> M Herskovitz 'Statement on human rights' (1947) 49 *American Anthropologist* p 539.

variations in the protection of human rights.<sup>53</sup> Many scholars have questioned the strict presumptions upon which human rights are based<sup>54</sup> and have suggested that a great deal of flexibility must be incorporated when formulating conceptions of human rights across different cultures.<sup>55</sup> In this regard, Obemeyer observes:<sup>56</sup>

It is increasingly recognised that while absolute universals cannot be found, it is possible, and indeed desirable, to seek common denominators across cultures, which in turn can be used to develop contextually relevant notions of [human] rights.

The debate between universalists and relativists concerning the appropriateness of a western-inspired ideology for non-western societies has not escaped the notice of African and Africanist scholars. Amongst this group, a rich diversity of opinion exists. The position of some western-trained African jurists is often uncritical of the universalist argument and is itself entrenched within liberal thought. Shivji has gone so far to describe this strain of human rights discourse as being 'less sophisticated than that of African social scientists.'<sup>57</sup> As an example, Asante's forceful argument on the applicability of human rights to African communities is reflective of this scholarly position. He emphatically argues:<sup>58</sup>

I reject the notion that human rights concepts are peculiarly or even essentially bourgeois or western, and without relevance to Africans. Such notions confuse the articulation of the theoretical foundations of human rights with the ultimate objective of any philosophy of human rights. Human rights quite simply, are concerned with asserting and protecting human dignity, and they are ultimately based on a regard for

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<sup>53</sup> See A Pollis 'Cultural relativism revisited: Through a state prism' (1996) 18 *Human Rights Quarterly* p 316 at p 317.

<sup>54</sup> See M Obemeyer 'A cross-cultural perspective on reproductive rights' (1995) 17 *Human Rights Quarterly* p 366 at p 368.

<sup>55</sup> See generally Alison Dundes Renteln *International human rights: Universalism versus relativism* (Newbury Park, California, London: Sage Publications, 1990).

<sup>56</sup> M Obemeyer n 54 above p 368.

<sup>57</sup> Issa G Shivji *The concept of human rights in Africa* (Dakar: Codesria, 1989) at p 11.

<sup>58</sup> Asante quoted in H Hannum 'The Butare colloquium on human rights and economic development in Francophone Africa: A summary and analysis' (1979) 1 *Universal Human Rights* p 1 at p 15 at fn 67.

the intrinsic worth of the individual. This is *an eternal and universal phenomenon* and it is also true to Nigerians and Malays as to Englishmen and Americans.

Those who argue against this universalist critique of human rights in Africa advance a cultural specific alternative. They observe that human rights as conceived in the west are rejected in Africa precisely because their philosophical basis is not only different but indeed opposite. It is opined that whereas the liberal construct of human rights is premised on an autonomous and rational individual, the African worldview knows not of such individualism. Pollis affirms this contention when she asserts:<sup>59</sup>

Whatever the diversity amongst third world countries in their traditional belief systems, individuals still perceive themselves in terms of their group identity. Who and what an individual is has been conceptualised in terms of the kinship system, the clan, the tribe, the village, whatever the specific cultural manifestations of the underlying prevailing worldview.

Consequently, any theory of human rights must take into account this reality if it is to be of any use to Africans. In affirming Pollis' reminder, it is sufficient to observe that a considerable number of African scholars argue against what Ejidike terms 'cultural-monopolist' derivations of the origins of human rights.<sup>60</sup> He instead advocates a cultural-universalist conception which he considers not only possible but also very necessary. He argues thus:<sup>61</sup>

To arrogate the concept [of human rights] to some groups, cultures, and civilisations to the exclusion of others would be deleterious to the momentum toward universal consensus on human rights in at least two ways. It would harden or ossify divisive tendencies and provide ammunition for apologist justification of violations.

Ibhawoh subscribes to this view but for a different reason. He suggests that one reality that has strengthened the need for the universalisation of human rights is the trend

<sup>59</sup> A Pollis 'Liberal, socialist and third world perspectives of human rights' in P Schwab & A Pollis (eds) *Toward a human rights framework* (New York: Praeger, 1982) pp 1ff.

<sup>60</sup> OM Ejidike n 49 above at p71.

<sup>61</sup> As above.

toward rapid globalisation in almost every sphere of human endeavour. He observes that:<sup>62</sup>

The spread of the western model of the state to Africa and other parts of the developing world has given rise to the need for constitutional and other legal guarantees of human rights. Thus, the modern concept of human rights, admittedly a product of the west, is becoming equally relevant in other parts of the world.

Whilst acknowledging the relevance of universal norms, Ibhawoh nevertheless cautions against universalistic expositions of human rights in the construction of their protection. Instead, he argues for approaches which take into account and are enriched by the 'African cultural experience.'<sup>63</sup> Aidoo attributes the absence of this Africanness to the fact that 'original research in the area of human rights in Africa is scanty.'<sup>64</sup> He decries the seeming preoccupation of scholars with human rights discourse at the formal level at the expense of considering civil society 'where cultural traditions and customs impact negatively on specific rights.'<sup>65</sup> Aidoo, therefore, emphasises the need for urgent research on such themes as the 'cultural foundation of human rights' amongst others, which in his view have not been sufficiently addressed by African scholars.

In view of the above observations, it is vitally important that the literature and scholarship on children's rights in Africa must seek to align itself with the realities of African children so that a firm 'cultural foundation' is established for this category of human rights. However, one aspect which almost all of these scholars omit to focus their attention are the source documents. It is critically important that not only scholarship has proper cultural foundations but also the core instruments protecting the rights of the child.

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<sup>62</sup> B Ibhawoh 'Between culture and constitution: Evaluating the cultural legitimacy of human rights in the African state' (2000) 22 *Human Rights Quarterly* p 839.

<sup>63</sup> As above.

<sup>64</sup> A Aidoo 'Africa: Democracy without human rights?' (1993) 15 *Human Rights Quarterly* p 703 at p 713.

<sup>65</sup> B Ibhawoh n 62 above at p 840.

#### 4 Documents affecting the rights and welfare of the African child

As noted earlier in this discussion, international efforts to prescribe a catalogue of children's rights may be traced back to the 1924 Declaration which was later followed by the 1959 Declaration. However, at the time when these documents promulgated, the majority of African states were still under colonial rule.<sup>66</sup> The principles in these documents were arguably not intended to benefit children who found themselves under colonial rule despite the universalistic tones in which they were couched.

Despite this gloomy background, when African states adopted the Declaration on the Rights and Welfare of the African Child ('the African Children's Declaration')<sup>67</sup> in 1979 at the sixteenth ordinary session of the Assembly of Heads of Government of the Organisation of African Unity ('the OAU') in Liberia, Monrovia; they explicitly recognised the 1959 UN Declaration by declaring that member states of the OAU 'should undertake or continue...efforts to renew the current legal codes and provisions relating to the rights of children, particularly by taking into account the 1959 UN Declaration.' Thus, quite clearly the OAU subscribed to the ideals that the 1959 UN Declaration enunciated. At the same time, the African Children's Declaration gave political force to an otherwise particularistic account of children's rights which did not have an African cultural foundation.

Further to that, the African Children's Declaration took an unequivocal cognisance and gave support to the processes in the UN General Assembly with respect to the rights of the child. In particular, the Declaration mentioned UN General Assembly resolution 1/31/169 which proclaimed 1979 as the International Year of the Child ('the IYC').<sup>68</sup> In this regard, the African Children's Declaration called on all OAU

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<sup>66</sup> See generally L Muthoga 'Analysis of international instruments for the protection of the rights of the child' in Community Law Centre (ed) *International conference on the rights of the child: Papers and reports of a conference convened by the Community Law Centre* (Cape Town: Community Law Centre, 1992) at p 123.

<sup>67</sup> Declaration on the Rights and Welfare of the African Child AHG/St. 4 (XVI) Rev. 1 1979. Text also available at <[www.chr.upac.za/hr\\_docs/african/docs/ahsg/ahsg36.doc](http://www.chr.upac.za/hr_docs/african/docs/ahsg/ahsg36.doc)> (accessed 12 October 2006).

<sup>68</sup> African Children's Declaration, preamble.

member states to form permanent commissions or machineries bestowed with the necessary legal powers to assist in implementing the IYC.<sup>69</sup>

Further still, the African Children's Declaration grounded the conception and implementation of children's rights within an African socio-political context by declaring that African children are inheritors and keepers of African cultural heritage and consequently called on member states to ensure that:

...efforts should be made to preserve and develop African arts, language and culture and to stimulate the interest and appreciation of African children in the cultural heritage of their own countries and of Africa as a whole.<sup>70</sup>

In other words, no conception of children's rights should rob African children of their legacy, inheritance and inheritance as children of the continent. At the same time, the Declaration makes it clear that the recognition of cultural values should not assume primacy over the protection of children's rights. Rather, the two paradigms should complement each other and help achieve the adequate protection of African children.<sup>71</sup>

However, despite this strong acceptance of children's rights by the OAU, the issue did not feature as emphatically in the subsequent statement on human rights by the organisation. The African Charter on Human and Peoples' Rights ('the African Human Rights Charter' or 'the African Charter')<sup>72</sup> which was adopted by the OAU in 1981 did not provide extensively for children's rights. In the words of Viljoen, 'children are only referred to on one occasion, as an afterthought, in the context of women's rights' in article 18(3) where the African Human Rights Charter enjoins states parties to 'ensure...the protection of the woman and child as stipulated in international declarations and conventions.'

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<sup>69</sup> African Children's Declaration, para 1.

<sup>70</sup> African Children's Declaration, para 10.

<sup>71</sup> African Children's Charter, para 2.

<sup>72</sup> African Charter on Human and Peoples' Rights, adopted June 27, 1981 (entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

A debate ensued regarding whether by virtue of this provision, states parties to the African Human Rights Charter became legally bound by the provisions of the 1959 UN Declaration and subsequent instruments that dealt with women's or children's rights<sup>73</sup>. Whilst some authors sought to give a generous interpretation to the article, it is difficult to see how states could become bound by these declarations or conventions without formally submitting to the prescribed ratification process of the concerned instruments. Indeed the Vienna Convention on the Law of Treaties ('the Vienna Convention')<sup>74</sup> which is considered the definitive statement on the law of treaties would not regard the situation envisaged under article 18(3) of the African Charter as evincing an intention to become legally bound by subsequent instruments.<sup>75</sup> At best the provision could be considered as an expression of a political commitment to support the processes within the UN aimed towards securing children's rights as opposed to an automatic ratification mechanism. This interpretation is confirmed by the fact that all of the 52 African countries that are bound by the CRC had to ratify the treaty in accordance with its provisions despite their ratification of the African Charter.<sup>76</sup>

However, despite accepting the provisions of the CRC *en masse*, African states still sought to draft provisions of an instrument on the rights of the child which reflected African concerns. Hence the drafting of the African children's Charter by a working group of African experts on the rights and welfare of the child.

According to Muthoga, the idea to adopt an instrument on the rights of the African child 'originated from a desire to address certain peculiarly African problems' which had not been addressed by the CRC.<sup>77</sup> Among other concerns; the peculiarities of the

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<sup>73</sup> F Viljoen 'Supra-national human rights instruments for the protection of children in Africa : the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31 *The Comparative and International Law Journal of Southern Africa* p 199 at p 205.

<sup>74</sup> Vienna Convention on the Law of Treaties, adopted 22 May 1969 (entered into force 27 January 1980) 1155 *UNTS* p 331.

<sup>75</sup> See Vienna Convention, arts 11-16.

<sup>76</sup> See CRC, arts 47 & 48.

<sup>77</sup> L Muthoga n 66 above at p 124.

African situation omitted from the Convention were identified as the situation of children living under apartheid; disadvantages facing the African girl child; the African conception of the community's responsibilities and duties; the role of the extended family in the upbringing of children; the use of children as soldiers; and problems of internal displacement arising from civil wars and internal insurrections.<sup>78</sup>

Similarly, Wako attributes the drafting of the Charter to the value of regional arrangements per se as a moving force for positive change and in this case, as a tool for the enhanced protection of African children. In this regard, he mentions resolutions of the UN General Assembly and concludes that 'each region, with its unique culture, traditions and history, is best placed to handle and resolve its human rights situation.'<sup>79</sup> In a nutshell, the appropriateness of the CRC to the African child was weighed and found somewhat wanting. The intention thus was to supplement or plug in the holes presented by the global instrument.

Viljoen, however, attributes the African initiative to frustration with the UN process during the drafting of the CRC. He correctly observes that African nations were grossly underrepresented during the drafting process. He notes:

African involvement in the drafting process was limited. Only three African states participated for at least five of the nine years that the working group took to draft the final proposal. This is the lowest percentage of all continents, contrasting sharply with west European (61% of the continental potential) and even Latin American (29%) participation over a similar period.<sup>80</sup>

Consequently, it was difficult to get on board in a forceful way issues that reflected the African cultural context. In other words, potentially divisive and emotive issues were omitted in the search for consensus between states from diverse backgrounds.<sup>81</sup> Thus, although the CRC addressed every aspect of children's lives, specific

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<sup>78</sup> F Viljoen n 73 above at p 206

<sup>79</sup> SA Wako 'Towards an African Charter on the Rights of the Child', paper delivered at the Workshop on the Draft Convention on the Rights of the Child, Nairobi, 9-11 May 1988. at p 7 (Paper on file).

<sup>80</sup> F Viljoen n 73 above at p 200.

<sup>81</sup> As above at p 205.



provisions on aspects peculiar to Africa fell victim to the overriding aim reaching a compromise and the African Children's Charter was intended to fill that void in terms of African concerns. The Charter incorporates the universalist outlook of the CRC but at the same time clothes its conceptions within the 'African cultural context.' It is, therefore, a document with a cultural-universalist outlook and a perfect start point for the consideration and elucidation of children's rights in Africa.

Another useful document for analysing the rights and welfare of the child is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('the Women's Protocol' or 'the Protocol').<sup>82</sup> The Women's Protocol, which contains an extensive compendium of rights for women defines 'woman' as 'persons of female gender, including girls.'<sup>83</sup> Consequently, the Protocol provides another source of protection for African girl-children. However, the majority of the literature dealing with the rights and welfare of the African child is mostly based on the CRC and the African Children's Charter is merely mentioned by the way.

## 5 Literature on the rights and welfare of the African child

The CRC is the principal normative framework relied on in most analyses relating to the rights of the child in Africa. Thus, most of the discussions in the secondary literature examine specific issues regarding children's rights in Africa or within particular domestic jurisdictions in light of the standards propounded by the CRC. In these analyses, the African Children's Charter does not feature prominently, if at all. For example, in Alston's work relating to the best interests of the child and how the concept may be analysed, interpreted and implemented within various cultural contexts, out of the contributors dealing with the concept from an African perspective, only one makes reference to the African Children's Charter.<sup>84</sup> Similarly, in Ncube's laudable work on the interaction between law, culture, tradition and children's rights,

<sup>82</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 13 September 2000 (entered into force 25 November 2005) CAB/LEG/66.6.

<sup>83</sup> Women's Protocol, art 1(k).

<sup>84</sup> See B Rwezaura 'The concept of the child's best interests in the changing economic and social context of sub-Saharan Africa' in P Alston (ed) *Best interests of the child: Reconciling culture and human rights* (Oxford: Oxford University Press) p 80 at p 83.

only Ncube's analysis<sup>85</sup> is based on the African Children's Charter whilst the rest of the contributors adopt the CRC as the benchmark.

The large volume of literature analysing the rights of children in Africa in terms of the CRC is necessary and perhaps inevitable for a number of reasons. Firstly, all African states, save for Somalia, have ratified the Convention. It is thus important to develop scholarship which critically investigates the implementation as well as the implications of the Convention. Secondly, African states were slow in ratifying the African Children's Charter after its adoption by the African Union (formerly the Organisation of African Union) on 11 July 1990 at Addis Ababa, Ethiopia. Thus, whilst commentators were marvelling at the speed and volume at which the Convention had been ratified by African states, the African Children's Charter could lay claim to no such fame. It remained in the background, not influencing the discourse on children's rights in Africa as it ought to have done.

Ironically, the emphasis on the CRC makes it very difficult to avoid universalistic expositions of children's rights and, therefore, poses one of the key obstacles to developing an appropriately distinctive African discourse on children's rights. Consequently, investigations into how the virtues of African cultural heritage, historical background and the values of African civilisation shape the contours of protection for African children are hard to come by since these principles did not inspire the conception of children's rights in the CRC.

However, this state of affairs notwithstanding, some scholars have made contributions based on the African Children's Charter itself. This motley collection of literature may be better described by its paucity than its depth of analysis. However, in a manner not unlike the contributions based on the CRC, most of the literature based on the African Children's Charter assumes the cultural legitimacy of children's rights within African communities. As a result, the majority of the works are either abstract

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<sup>85</sup> W Ncube 'The African cultural fingerprint? The changing concept of childhood' in W Ncube (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (Dartmouth, 1998) at p 11.

textual examinations of the relevant instruments or analyses of particular harmful practices which are inconsistent with the said instruments.

Thus, Gose presents a comparative analysis of the African Children's Charter with the CRC which concentrates on the differences between the wording of the Charter and the CRC.<sup>86</sup> He painstakingly highlights the textual differences between the two documents and often comments on the implications that the differences may have in the interpretation of the Charter. His meticulousness is demonstrated when he observes that '...article 27 of the Charter contains flaws in relation to its numbering. The Charter's provision is numbered as 27(1) while there is no other subsection in the article.' This level of thoroughness is reflected in the entire work. However, he does not address the question of the Charter's or the CRC's relationship to the socio-political context of the African child.

Another example of work that avoids engagement with the lived reality of African children is the contribution by Lloyd.<sup>87</sup> In her article, she explicitly sets out to present a 'theoretical analysis' of children's rights in Africa and although her analysis proposes to discuss 'the reality of children's rights in Africa'; that reality is limited to the text of the African Children Charter and other documents within the African human rights system. Like Gose, she presents a wide-ranging critique of the substantive provisions of the Charter and makes comparisons between the African Children's Charter and the CRC. This discussion is then rounded off by an examination of the monitoring and enforcement mechanisms envisaged by the Charter. However, the absence of context-based analysis or material leads her to conclude that '[b]asically, before the adoption of the African Children's Charter, children had no voice, no specific rights or protection';<sup>88</sup> a proposition which does not accurately describe the situation of children before the adoption of the Charter. She, however,

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<sup>86</sup> See generally Michael Gose *The African Charter on the Rights and Welfare of the Child: An assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child* (Cape Town: Community Law Centre, 2002).

<sup>87</sup> Amanda Lloyd 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' (2002) *African Human Rights Law Journal* p 11.

<sup>88</sup> As above, at p 31.

correctly observes that as far as the African Children's Charter is concerned, '[t]here is a lack of awareness..., and notable lack of academic debate.'<sup>89</sup>

Similarly, Chirwa 'critically discuss[es] the merits and demerits of the African Children's Charter.'<sup>90</sup> He analyses some concepts and themes which are central to the African Children's Charter such as obligations of states parties, non-discrimination, best interests principle, the child's survival and development and others. Like Gose, Chirwa uses the CRC as the comparator for his analysis and points out the shortcomings or improvements that the Charter has over the CRC. He, however, omits to engage critically with the context of the rights and welfare of the African child.

Thus, a significant part of the discourse on children's rights in Africa has assumed that children's rights are a legitimate enterprise within African societies. Such an approach not only erroneously expects international norms respecting children's rights to override inconsistent cultural norms but also stifles the development of a conceptual framework for resolving the inevitable conflict between African traditional values and children's rights.

Some contributions though, attempt to avoid an abstract rendering of the Charter's provisions and provide some background or context to their adoption or operation. For example Viljoen's contribution, though generally presenting a textual analysis of the African Children's Charter, adverts to some cultural justifications for the adoption of the Charter.<sup>91</sup> He also attempts, albeit cursorily, to engage with the issues that make it necessary to have an African document on the rights of the child. The article, although providing a suitable context to the promulgation of and necessity for the African Children's Charter, attempts to engage with too many issues and as a result does not deal with them in any sufficient depth.

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<sup>89</sup> As above, at p 32.

<sup>90</sup> DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* p 157 at p 157ff.

<sup>91</sup> F Viljoen 'The African Charter on the Rights and Welfare of the Child' in CJ Davel (ed) *Introduction to child law in South Africa* (Landsdowne: Juta, 2000) p 214.

Thompson also combines a textual analysis with an examination, albeit very brief, of the implications of the African Children's Charter on African family law.<sup>92</sup> Her analysis, unlike those discussed above, does not focus on weighing the African document against the CRC but proceeds to examine the provisions of the Charter *sui generis* thereby affirming the African Children's Charter's position as a self-standing document.<sup>93</sup> This analysis is followed by an examination of the position of African family law in the context of the protections prescribed by the African Children's Charter. Her analysis, however, does not seek to investigate and resolve the profound questions associated with children's rights and family relationships. She merely raises questions whose answers are left unstated thereby implying the need for further grounded research. Regrettably though, she calls for a normative break with cultural traditionalism in the protection of children's rights and points to the African Children's Charter as evidence of such break.<sup>94</sup> What is needed now are not normative breaks with tradition but an affirmation of traditionalism in the whole enterprise of children's rights and the African Children's Charter, far from affirming such break, calls for a prominent place for African values and civilisation in the conception of children's rights.<sup>95</sup>

An additional recent resource that begins to clarify children's rights in Africa by reference to the lived reality of African children is Ncube's laudable collection of essays<sup>96</sup> which highlights practices and notions which are inconsistent with the African Children's Charter and the CRC. One of Ncube's contributions in the volume which is based on the African Children's Charter calls for 'African cultural fingerprinting' in the conception and implementation of children's rights in Africa.<sup>97</sup> He emphasises the importance of local cultural context in giving substantive rights their meaning.<sup>98</sup> He, therefore, calls for the need for research directed at

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<sup>92</sup> Bankole Thompson 'Africa's charter on children's rights: A normative break with cultural traditionalism, (1992) 41 *International and Comparative Law Quarterly* p 432.

<sup>93</sup> M Gose n 83 above at pp 12-15.

<sup>94</sup> B Thompson n 88 above at p 433.

<sup>95</sup> African Children's Charter, preamble.

<sup>96</sup> W Ncube n 85 above.

<sup>97</sup> As above at p 11.

<sup>98</sup> As above at p 15.

‘understanding the intersections and interfaces between children’s rights as conceived in the relevant human rights instruments and the cultural and social context of Africa.’<sup>99</sup> The essays that follow his contribution attempt to address this critical need for contextualisation. However, the studies offer microanalyses of particular rights, contexts or domestic situations with the result that a sustained analytical framework is absent. There are, therefore, questions that still need to be investigated.

## 6 Emerging questions

Recognising that the majority of the literature assumes the cultural legitimacy of children’s rights in Africa, there remain important questions regarding the appropriateness of this category of human rights in the African context. How has the debate regarding the universality or relativity of human rights shaped the conception of children’s rights? Is there a need for the African Children’s Charter? And if so, does it guarantee better or more efficacious protection for African children?

In this regard, one must then consider in what ways the African Children’s Charter makes provision that is ideally suited to the African cultural context. Do the core concepts in the Charter bear or encourage African cultural fingerprinting? In what respects do they encourage the development of a distinctively African discourse on children’s rights?

Obviously, a consideration of the core principles raises questions as to their implementation. How should this be achieved at the formal level? How about at the informal level? Is it possible to sustain the cultural context of the African Children’s Charter at this stage? What tools, agencies or strategies ought to be relied on during this process?

In examining these questions, the thesis adopts both a socio-legal as well as library-based methods to present an analysis of the African Children’s Charter that is not only situated within current debates in human rights but also reflective of the impact of

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<sup>99</sup> As above at p 26.

context in the pursuit of universal rights. The next chapter discusses these methodologies more fully.

## Chapter 3

### Methodology

#### 1 Introduction

The preamble of the African Charter on the Rights and Welfare of the Child ('the African Children's Charter' or 'the Charter')<sup>1</sup> makes two important statements regarding the instrument's conception of the rights and welfare of the child. Firstly, it identifies the Charter's foundation as the principles of the international law on the rights and welfare of the child as contained in the declarations, conventions and other instruments of the Organization of African Unity and the United Nations.<sup>2</sup> Significantly, the Charter specifically mentions the Convention on the Rights of the Child ('the Convention' or 'the CRC'),<sup>3</sup> and the Declaration on the Rights and Welfare of the African Child ('the African Children's Declaration').<sup>4</sup> Secondly, the Charter charges that the concept of the rights and welfare of the child should be inspired and characterised by the virtues of African cultural heritage, historical background and the values of the African civilisation. In other words, the rights and welfare of the child, which are derived from universal sources, must be alive to the reality of African children. In order to pay sufficient regard to this caveat, I combined library-based international law methods which focus on the texts of the documents with fieldwork-based socio-legal methods which enabled me to sketch a glimpse of the lived reality of African children in my analysis.

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<sup>1</sup> African Charter on the Rights and Welfare of the Child, adopted July 1990 (entered into force 29 November 1999) OAU Doc.CAB/LEG/24.9/49 (1990).

<sup>2</sup> As above, preamble para 8.

<sup>3</sup> Convention on the Rights of the Child, adopted 20 November 1989 (entered into force 2 September 1990) GA Res. 44/25 (1989), UN Doc. A/RES/44/25 (1989). Text also available in 28 *International Legal Materials* (1989) 1448 and 29 *International Legal Materials* (1990) 1340.

<sup>4</sup> Declaration on the Rights and Welfare of the African Child AHG/St. 4 (XVI) Rev. 1 1979. Text also available at <[www.chr.upac.za/hr\\_docs/african/docs/ahsg/ahsg36.doc](http://www.chr.upac.za/hr_docs/african/docs/ahsg/ahsg36.doc)> (accessed 12 October 2003).



This chapter outlines how I set about utilising these respective methodologies in my investigation into the cultural legitimacy of the African Children's Charter.

## 2 Library-based methodology

Recognising that the African Children's Charter is a derivative instrument,<sup>5</sup> the principal global human rights treaties, namely the International Covenant on Civil and Political Rights;<sup>6</sup> the International Covenant on Economic, Social and Cultural Rights;<sup>7</sup> the African Charter on Human and Peoples' Rights ('the African Charter');<sup>8</sup> the European Convention on Human Rights;<sup>9</sup> and the American Convention on Human Rights,<sup>10</sup> along with other human rights documents and international instruments that refer to the rights of children and the principal themes of the African Children's Charter such as the Universal Declaration of Human Rights<sup>11</sup> and other declarations of the United Nations General Assembly serve as the main sources for elaborating the main themes of the Charter. In this regard, the African Charter is particularly useful because it is similar in conception and ideological posturing to the African Children's Charter.

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<sup>5</sup> By this, it is meant that the principles in the Charter were sourced or developed from principles developed in other instruments.

<sup>6</sup> International Covenant on Civil and Political Rights, adopted 16 December 1966 (entered into force 23 March 1976) G.A. res. 2200A (XXI), 21 U.N. GAOR Supp (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

<sup>7</sup> International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966 (entered into force 3 January 1976) G.A. res. 2200A (XXI), 21 U.N. GAOR Supp (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3.

<sup>8</sup> African Charter on Human and Peoples' Rights, adopted 27 June 1981 (entered into force 21 October 2001), OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>9</sup> European Convention on Human Rights, adopted by the Council of Europe on 4 November 1950 (entered into force on 3 September 1953) (ETS 5), 213 U.N.T.S. 222, as amended by Protocols Nos 3, 5, and 8 which entered into force on 21 September 1970, 20 December 1971 and 1 January 1990 respectively.

<sup>10</sup> American Convention on Human Rights, adopted on 22 November 1969 (entered into force 18 July 1978) O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

<sup>11</sup> Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

The monitoring mechanisms of the human rights treaties referred to above are entrusted in the hands of various committees and tribunals.<sup>12</sup> These committees have, amongst other competencies, the duty to elaborate the content of the instruments either through the examination of state reports or the consideration of complaints from individuals or other states parties or through the promulgation of general comments.<sup>13</sup> Their pronouncements serve as a rich and authoritative source of interpretation of the substantive provisions of the instruments.<sup>14</sup> Such pronouncements, therefore, provide a useful source for elaborating the provisions of the African Children's Charter.<sup>15</sup> Wherever relevant, particular attention is paid to the opinion of the African Committee on the Rights and Welfare of the Child; the body mandated to oversee the implementation of the African Children's Charter.<sup>16</sup> Other useful committees are the African Commission on Human and Peoples Rights which is mandated to oversee the implementation of the African Charter<sup>17</sup>; the Committee on the Rights of the Child which supervises the CRC;<sup>18</sup> as well as the Committee on Elimination of Discrimination against Women.<sup>19</sup>

Domestic standards are another vital source for elaborating the rights of the child. International and domestic standards exist in a complementary relationship from the

<sup>12</sup> See generally P Alston & J Crawford (eds) *The future of UN Human rights treaty monitoring* (Cambridge: Cambridge University Press, 2000).

<sup>13</sup> See M Scheinin 'International mechanisms and procedures for implementation' in R Hanski & M Suksi (eds) *An introduction to the international protection of human rights: A textbook*, 2<sup>nd</sup> revised ed (Turku, Abo: Institute for Human Rights, Abo Akademi University, 2000) at p 429.

<sup>14</sup> See generally I Boerefijn 'The impact of the work of the UN treaty bodies on national courts and tribunals' (2000) available at <<http://www.abo.fi/instut/imr/ILA-files/Boerefijn.doc>> (accessed on 22 December 2006).

<sup>15</sup> See African Children's Charter, art 46.

<sup>16</sup> See African Children's Charter, arts 42-45. The Committee is yet to have an official publication. See Amanda Lloyd 'The first meeting of the African Committee of Experts on the Rights and Welfare of the Child (2002) *African Human Rights Law Journal* pp 320-326.

<sup>17</sup> See African Charter, art 45. See also African Commission on Human and Peoples' Rights, *Annual Activity Reports* (1986-2003).

<sup>18</sup> See CRC, arts 43-45. See also CRC, *General comments* (2001-2003).

<sup>19</sup> See 'Committee on the Elimination of Discrimination against Women' <<http://www.un.org/womenwatch/daw/cedaw/committee.htm>> (accessed 22 December 2006).

jurisprudential inter-development of these legal systems. Each system assists the other in refining the other and in shaping the ultimate direction of the rights of the child. The different approaches adopted by domestic legal systems also provide a useful cross-fertilisation between the international and domestic systems, thereby amplifying the manner in which the rights of the child may best be secured through the use of comparative methods.<sup>20</sup>

In the natural and medical sciences, progress has largely been due to extensive exchange of discoveries and opinions. This exchange happens as a matter of course so that its impact on scientific discovery is often taken for granted. The process is so entrenched that one does not encounter concepts such as Malawian chemistry or Saharawi biology. The same, however, may not be said of law. Juristic thought and legal development has attempted, with considerable success, to compartmentalise law within particular legal traditions or jurisdictions. It is, thus, correct to speak of English law or Malawian law even when the particular legal rules in question may be dealing with identical legal problems. This posturing of legal thought is constraining and serves to limit the range of solutions that may be available for the resolution of issues.<sup>21</sup>

Comparative law attempts to resolve this problem and increase the range of options available in the resolution of legal issues. It offers a method of comparing different legal systems' resolution of legal problems and inquiring whether one or the other legal system's solutions are more efficacious. If one accepts that legal science includes not only the techniques of interpreting the texts, principles, rules, and standards of a national system, but also the discovery of models for preventing or resolving social conflicts, then it is clear that comparative law methods provide a much richer range of model solutions than a study which is devoted to a single legal tradition or system.<sup>22</sup>

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<sup>20</sup> LM Hammer *The international human right to freedom of conscience: An approach to its application and development* (PhD thesis, University of London, 1997) at p 27.

<sup>21</sup> K Zweigert & H Kotz *Introduction to comparative law*, 2<sup>nd</sup> revised ed, (Oxford: Clarendon Press, 1987) at pp 14-15. See also P de Cruz (1995) *Comparative law in a changing world* (London: Cavendish Publishing Limited 1995) at pp 1-29.

<sup>22</sup> As above.

In the context of this study, comparative law methods are adopted wherever possible to see how best the cultural legitimacy of children's rights may be enhanced within African societies. It is the my firm belief that effective answers to the questions posed by this study cannot come from one particular legal tradition but must instead be garnered from an eclectic mix of solutions straddling African indigenous law, international human rights law, domestic legislation and other such sources. This method is also in line with the philosophical approach of this study which encourages cross-cultural discourse in the enhancement of cultural legitimacy for children's rights in Africa. Further evidence that both international and domestic approaches to securing children's rights are viable sources of interpretation may be sourced from article 38 of the Statute of the International Court of Justice ('the ICJ Statute')<sup>23</sup> and article 46 of the African Children's Charter. Article 38(1) of the ICJ Statute does not appear to create a hierarchy of sources between international sources of law such as conventions and general principles of law as recognised by civilised nations. Similarly, the article 46 of the African Children's Charter does not create any hierarchical categories by its use of the term 'international law on human rights'. While judicial decisions are a subsidiary means for determining international law, there is no indication that they should be accorded secondary status, particularly because the individual's ability to raise an international human rights cause of action before a judicial tribunal develops within the domestic setting.<sup>24</sup>

Finally, the concepts and standards that are embodied in the African Children's Charter, the CRC, and other international instruments have been investigated, analysed and elucidated by many different authors in a variety of contexts and from wide ranging perspectives. These writings constitute an important resource for understanding and elaborating the principles in the African Children's Charter. Consequently, use is made of relevant books and journal articles on human rights generally, children's rights as well as legal anthropology.

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<sup>23</sup> Statute of the International Court of Justice, adopted 26 June 1945, 59 Stat. 1055, 3 Bevans 1179.

<sup>24</sup> M Scheinin n 13 above at p 429.

### 3 Field work methodology

Children's rights are not some objectively defined truths that exist out there or that are written down in international and regional children's rights documents. Rather, they consist of, reflect and are influenced by the daily practices of peoples within a variety of contexts. A socio-legal study such as the present one cannot, therefore, afford to simply layout and analyse the legal framework for the rights of the child but must also attempt to present the views of the children themselves as well as those who play significant roles in their upbringing.

With this observation in mind, I set out to sketch a work plan that would enable me conduct fieldwork within a context where the Charter's ideas could be investigated and tested. The initial stages of the work plan involved attending classes on social research methodology at the School of Oriental and African Studies (SOAS) as well at University College London. After eight methodology lectures, I still had no clear idea on how field work was conducted. I, therefore, started scouring written fieldwork-based theses in libraries at SOAS, Institute of Advanced Legal Studies and the University of London central library. I found a wealth of helpful material on planning, data collection techniques, data analysis and presentation that helped set me on my way towards drawing up my own research plans. In this regard, I found Effa Okupa's ethnological study on the Himba law and child-rearing practices inspiring.<sup>25</sup> Although the study is not a treatise on how to conduct field study, it confirmed that there were alternatives methods of studying children's rights other than through poring over legal texts in SOAS library. Spurred on by the mistaken belief that I could replicate the sense of authenticity that emanated from Okupa's study, I started envisioning the field and asking myself the 'what', 'where', 'when' and 'how' questions.

Doing this exercise in the cold winter days of London was a particularly arduous task since it is so far removed from the locations and categories of persons involved in the

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<sup>25</sup> E Okupa *Ethno-jurisprudence of children's rights: A study of the Himba of Namibia* (PhD thesis, University of London, 1995).

promotion and protection of the rights and welfare of the African child. It therefore took some time before I came up with a presentable research plan covering what I considered the basic elements of the fieldwork. I drew up a list of questions that I wanted to investigate in order to test the cultural legitimacy of the African Children's Charter; I decided I would do the fieldwork in Malawi; when I would fly out for the fieldwork and how long I would stay at the research site; and more importantly how I would go about conducting the research. On paper, the research plan was flawless. In reality, fieldwork proved a little more difficult and a little less organised than neat notes presented to my supervisor and the faculty for approval of fieldwork. In the discussion that follows, I briefly outline my plans and how these panned out during the field work.

### **3.1 Getting started**

After appraising myself on various theoretical models on social research methods; I begun drawing up the research plan by drafting a set of questions that I intended to administer once the fieldwork got underway. Drawing up these questions required drilling down to the core of the thesis in order to isolate the issues that I would need to investigate during the course of the fieldwork. However, after only two terms of doctoral study; the majority of which time was spent in research method seminars; there was not really much thesis to go on. Isolating key elements to focus on during fieldwork was therefore not unlike identifying the beef in Ilford High Road 'special' beef samoosas. Consequently, this initial formulation of questions was frequently amended before the fieldwork commenced as the central issues in the thesis became clearer. During the fieldwork itself, these questions were refined further as the work progressed as key interviewees made suggestions on what questions I needed to ask or suggested the proper manner that certain questions should be posed.

Having decided on the general scheme of questions that I would be investigating during the fieldwork, I set about identifying the supplies and equipment that would be required when the fieldwork commenced. Due to funding requirements, final budgets had to be submitted before the trip was made. Consequently, difficult questions like the number of batteries I was going to need during six months of fieldwork became very relevant. Before long I was busy trawling through Ebay, Amazon, Tottenham

Court Road, and of course Ilford High Street; looking for quotations on important supplies like paper, pen, tapes, sticker pads, highlighters, note books, data cards, post-its and other essentials. I made reservations for audio recording equipment from the Audio-Visual Department at SOAS. I arranged medical insurance and stocked up on over-the-counter medicines for common ailments. I also ensured that my access to the SOAS library's online materials would be live once I left London.

A few days before heading off, I had a final meeting with my supervisor. She asked me about my preparations. She asked questions about my substantive as well as technical arrangements. Even though I had told her that I had obtained recording equipment from SOAS, she still insisted on giving me her own voice recorder. The significance of this gesture was to become clear merely two days into the fieldwork when I discovered the SOAS recorder was only recording voices in slow motion and that the sophisticated microphone with which the recorder was supplied was depleting batteries at a rate that required me to have taken a small van of batteries on the fieldwork. The secondary voice recorder thus became the only recorder that I used during the fieldwork.

### **3.2 Choosing the research site**

Having decided on the scope of the study and made a list of the equipment I needed, I set about identifying a suitable site where the research could be undertaken. Since, the object of the field study was to examine how the central themes of the African Children's Charter had manifested themselves or failed so to do within an African traditional setting and thus test the African Children's Charter's claim to a characteristically Afro-cultural posture in its conception; I decided that the study would have to be conducted within an African setting. In particular, the field study would determine how and by whom the rights of the child are implemented and protected within such traditional settings. In a nutshell, the field work aimed to map out the congruence between the Charter and practices on the ground and determine whether culturally appropriate ways for protecting the rights and welfare of children have manifested themselves.

In choosing a research site, the researcher must be aware of several dynamics which may affect the output of the research. These dynamics include the possibility of entry; the probability that a rich mix of the processes, people, programmes, interests and/or structures that may be part of the question will be present; the possibility of the researcher devising an appropriate role to maintain continuity of presence; and that the data quality and credibility of the study are reasonably assured by avoiding poor sampling decisions.<sup>26</sup> In this case, I chose to conduct the study in Malawi because as a Malawian citizen, I spoke the language and understood, or thought I did, the attitudes and cultural framework within which I would be operating. More importantly, however, the choice was made because most of Malawi's population (82 percent) lives in rural areas where the majority of people are still influenced and guided by African 'tradition, values and civilisation' to borrow from the language of the African Children's Charter. Consequently, the questions and issues that the fieldwork sought to investigate were sure to present themselves for investigation.

In view of these considerations, I decided to conduct the study at Mpondasi village near Lake Malawi in Mangochi District in southern Malawi. I did not have a prior research connection with Mpondasi village. However, I knew a man who worked for a Catholic non-governmental organisation that run a feeding center in the village. I had met the man at a conference organised by Southern Africa Human Rights Trust in Harare in Zimbabwe many months before and we had kept in touch. He made arrangements for meeting the village elders and other key people that would help me get going with the study. However, when I got to Malawi, I found out that there was an outbreak of cholera at Mpondasi and adjacent villages. Due to time constraints, it was not possible to wait for the situation to stabilise so that I could start my research. Consequently, a site that had been mooted as a possible research site became *the* research site. This alternative area was Magombo village in the Thyolo District of southern Malawi. I had worked as an assistant on a research project on girls' educational achievement in Magombo village in 1999. I had considered Magombo village as a possible research site but the arrangements made by the colleague in

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<sup>26</sup> C Marshall & GB Rossman *Designing qualitative research* (Newbury Park, London: Sage publications, 1989) at p 54; AW Bentzon, A Hellum, J Stewart, W Ncube & T Agersnap *Pursuing grounded theory in law: South-North experiences in developing women's law* (Oslo: Mond Books 1998) at pp 132-119.



Mangochi seemed sufficient and thus the making of alternative arrangements seemed pointless. However, because of the new situation, I had to adapt my research design to the new site. I contacted Mr Musiyapo, a teacher at Thyolo Secondary School with whom I had made an acquaintance during the 1999 research. He suggested that I extend the investigation to cover two villages, Magombo and Ndalama, in order to increase the catchment area for the research. These two villages lie adjacent to each other and both straddle the *boma*<sup>27</sup> or local government administrative institutions as well as the outlying clusters of farming villages thereby possessing distinctively traditional characteristics spiced up with quasi-urban traits. The people of these villages are predominantly Lomwe<sup>28</sup> but largely converse in *Chichewa*, which is Malawi's *lingua franca*. Inter-marriage, a by-product of the labour patterns prevalent in the tea-growing estates of southern Malawi, has resulted in the incorporation of a significant number of Yao<sup>29</sup> and Tumbuka<sup>30</sup> people into the Lomwe social structure. However, due to the pervasiveness of Lomwe traditions and customs and of the need to gain social acceptance; these *obwera* or 'outsiders' have become more and more 'Lomwe' in their cultural and ancestral observations. However, the traffic has not just flowed one way but these *obwera* have also had quite a significant impact on Lomwe culture and custom. For example, whilst it is normal for the Yao to keep young men

<sup>27</sup> 'Boma' is a Kiswahili word meaning 'enclosure' and was used during colonial times to denote administrative offices or outposts of the British overseas military administration. The name remained in common use after decolonisation and denotes, amongst other things, the principal government offices in every district. See PJ Kishindo 'Evolution of political terminology in *chichewa* and the changing political culture in Malawi' (2000) 9 *Nordic Journal of African Studies* p 20 at pp 25-26.

<sup>28</sup> The Lomwe are one of the four largest ethnic groups living in Malawi. They are located primarily in the southeast parts of Malawi with the largest concentration being in Mulanje and Thyolo district. Others live in Chiradzulu, Zomba, and Liwonde. Smaller numbers are scattered throughout the southern region of Malawi. The Lomwe are originally from what is now Mozambique to the east and south west of Malawi. Even more Lomwe continue to live in Mozambique than in Malawi. However, the migration of large numbers of Lomwe to Malawi had already taken place before the missionaries, white traders, and colonialists arrived in the latter part of the nineteenth century. There was a large influx of Lomwe into Malawi in the 1930's because of tribal wars in Mozambique

<sup>29</sup> See generally A Woods & ME Page *The Creation of Modern Malawi* (Boulder, Colorado: Westview Press, 2000).

<sup>30</sup> As above.

who are undergoing initiation in the bush until the rains started, the usual Lomwe practice was to keep them there only until the instruction was complete. However, in Magombo village, the 'first rains rule' has gradually crept in because according to Village Head Magombo 'the settlers had become so settled that they started taking a leading part in initiation ceremonies.' When asked to explain the recruitment of *obwera* into the initiation process, the Village Head rhetorically asked: 'Is this not their home?' Consequently, the composition of the village peoples provides a rich diversity from which to detail the custom and practice relating to the rights and welfare of the child.

Furthermore, the proximity of the villages to government and other social institutions meant that there were processes and structures which made it easier to access possible interviewees.<sup>31</sup> For example, within the catchment area of the villages there were eight Christian denominations, a mosque, a police station, a local magistrate's court, two primary schools, one government-funded secondary school, two private secondary schools, a hospital, and a market. All of these institutions provided opportunities for interaction and investigating questions relating to the rights and welfare of the child. There were also other less institutional structures that served to present opportunities for interaction such as the maize mill, the barbershop, the *masese* or opaque beer garden and the football ground.

This mix of diverse people, structures and institutions ensured that I had a rich source of information from which I could draw upon in my investigations. The structure of social relationships within families and between different families as well as the interaction between the state, religion, traditional authority and individuals, to name but a few elements, created the possibility of observing authentic interaction as it happened. Additionally, the significantly large pool of possible study situations meant it was less complicated to identify relevant encounters for assessing aspects of the rights and welfare of children.

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<sup>31</sup> I have not used the usual anthropologists' term 'informant' as the Lomwe equivalent of this word carries with it a negative connotation meaning 'one who reports others to authorities.'

Thus although, Magombo and Ndalama village did not feature in my initial plans; the two villages provided the general environment envisaged by the research plan. The flexibility and generality offered by the research design ensured that the fieldwork was not derailed by the unavailability of one research site.

### **3.3 Gaining access**

Having decided on the location, I had to make arrangements relating to access. In order to facilitate and augment the effectiveness of the fieldwork, I planned to live within in Magombo village for the duration of the research. This arrangement obviously raised questions of access because in Malawi, one may not go out into a village and start asking questions without the knowledge and forbearance of the village fathers. Thus, even where one gives notice of his or her intention to conduct interviews in the village, the elders may still withhold consent where they consider the subject matter disruptive. The issue of children's rights is heavily contested in Malawian traditional settings and is sure to raise disputation. I had made arrangements for access into Mpondasi village community through my colleague but no similar arrangements had been made for the two villages for which I had substituted the original research site. In this regard, I solicited the help of my old acquaintance, Mr Musiyapo; who sought the consent of the village heads just days before I travelled to the research site. Mr Musiyapo also explained to the elders what the research was about and what it sought to achieve and the role that they as elders were going play in the whole scheme. Consequently, when I arrived at the village my visit was anticipated and I was received warmly. The intermediary had arranged a meeting with both Village Head Ndalama and Magombo and they promptly gave me licence to roam freely within their respective domains. My accommodation was arranged at Mr Musiyapo's house and during the early days of my study, Mr Musiyapo was virtually my shadow, showing me places of interest and advising which short cuts to avoid; and from which lady to buy my favourite snack: raw groundnuts.

### 3.4 Determining the pool of research participants

Due to the nature of qualitative research, my research plan did not prescribe numbers of participants that would be involved in the fieldwork. Instead, the general guideline was that the research would stop when the central themes were saturated or when time ran out. Consequently, having established access arrangements, the study relied on snowball sampling to make initial contact with a small group of persons who were relevant to the research topic and then use these to establish contacts with others.<sup>32</sup> These persons included teachers, traders at the market, religious officials and community workers. This snowball sampling technique was supplemented with theoretical sampling described by Glaser and Strauss as:

[t]he process of data collection for generating theory whereby the analyst jointly collects, codes, and analyses [her or] his data and decides what data to collect next and where to find them, in order to develop [her or] his theory as it emerges. The process of data collection is controlled by the emerging theory, whether substantive or formal.<sup>33</sup>

This entails that the process of participant location in the field study is an on-going process rather than a distinct and single stage, as may be the case in, for example, in quantitative data collection methods.<sup>34</sup> Moreover, it is important to realise that it is not just people who were the objects of this study, but rather, the data gathering was 'driven by concepts derived from evolving theory and based on the concept of 'making comparisons' whose purpose is to go to places, people or events that

<sup>32</sup> A Bryman 'Global Disney', in PT Taylor & D Slater (eds) *The American century* (Oxford: Blackwell, 1999); A Bryman *Social research methods*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2001) at p 98.

<sup>33</sup> BG Glaser & AL Strauss *The discovery of grounded theory: Strategies for qualitative research* (Chicago: Aldine Press, 1967) at p 45.

<sup>34</sup> E.g. statistical or probability sampling which is normally 'done to obtain accurate evidence on distributions of population among categories to be used in descriptions and verifications.' As above at p 62.

maximised the opportunities to discover variations among concepts and to identify categories in terms of their properties and dimensions.’<sup>35</sup>

This component of the research is the most important but also the most difficult. It required seizing opportunities for conversations and creating some where none were available. The research pool initially focused on some key individuals but as the fieldwork got into its stride the focus shifted to children and their families. Since this study is about children, I planned to put them at the centre of fieldwork activities. However, whereas establishing conversation opportunities with adults was not so difficult; the situation was somewhat different with children. In terms of creating conversation opportunities with children from various backgrounds, ages and genders, the most efficient way of contacting them was through their respective families, schools or churches. Additionally, gaining access to children within their families or other social institutions meant gaining the consent of the parents or guardians first.

Consequently, including children within the intended research pool meant dealing with the gate keepers. Once permission was granted to talk with children, I would then as a matter of procedure advise them on their right to refuse to take part, to stop the interview at any time, and to request that the recording equipment be stopped. However, it was only in a handful of cases where children elected not to answer particular questions. My impression was that once consent was given by the person whom the children considered to be in charge, they somehow felt bound to participate. Conversely, where consent was withheld by the gatekeeper, the child had no right to override that veto. Thus, the participation of children in this study highlighted issues that drive children’s rights discourse such as those concerning agency, choice and autonomy.<sup>36</sup>

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<sup>35</sup> A Strauss & JM Corbin *Basics of qualitative research: Techniques and procedures for discovering grounded theory* (Thousand Oaks, California: Sage Publications, 1998) at p 20.

<sup>36</sup> See generally C Pole, P Mizen & A Bolton ‘Realising children’s agency in research: Partners and participants?’ (1999) 2 *International Journal of Social Research Methodology* p 39; C Manga Fombad ‘Protecting children’s rights in social science research in Botswana: Some ethical and legal dilemmas’ (2005) *International Journal of Law, Policy and the Family* p 102 esp at pp 106-109. On children’s agency and autonomy, see J Eekelaar ‘The interests of the

In total, I held one – to – one interviews with 47 children and 56 adults. Of the 47 children, 32 were boys; and of the 56 adults, 41 were women. 35 of the children were in the age range between 11 and 18 whilst the rest were between six and 10. Further to that, I recorded 11 conversations with families which I defined for my notes as group conversations with either a mother *and* a father or each one of these or both *and* a child or children. I also maintained two focus groups at Thyolo Secondary School and Mpinji Community Day Secondary School with eight and 11 participants respectively. I recorded eight sessions with each of the focus groups.

### 3.5 Data capture methods

In view of the fact that the study sought to learn from the lived reality of the peoples of Malawi; it was ethnographical in nature.<sup>37</sup> Since ‘ethnography involves an on-going attempt to place specific encounters, events and understandings into a fuller, more meaningful context’,<sup>38</sup> the study was conducted through a variety of methods, including direct observation, participant observation, and also by way of semi-structured interviewing.<sup>39</sup> These data collection techniques were used to gather information on child upbringing in Lomwe society, what it meant to be a child, the concept of human rights generally, children’s rights, African traditional culture and beliefs and most importantly on the relevance and cultural legitimacy of children’s rights within traditional society. Questions were also asked on the role of law in society and what distinguished law from general culture. In particular, a set of questions addressed issues such as the equality of children, maintenance, inheritance rights, marriage, participation of children in matters that affect their lives, forced

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child and the child’s wishes: The role of dynamic self-determinism’ (1994) 8 *International Journal of Law and the Family* p 42 at pp 49-57.

<sup>37</sup> A Bryman n 32 above at pp 290-291; B Tedlock ‘Ethnography and ethnographic representation’ in NK Denzin & YS Lincoln (eds) *Handbook of qualitative research* (Thousand Oaks, London, New Delhi: Sage Publications, 2000) at pp455-456.

<sup>38</sup> B Tedlock, as above at p 455.

<sup>39</sup> AW Bentzon *et al* n 26 above at pp 195-209. Some of the icebreakers and general questions that were used during the fieldwork are in the appendices to this thesis.

marriages, child marriages, circumcision rites, duties of children and other issues. Questions were also be asked regarding the elimination of traditional practices that impede the realisation of children's rights as well as the prospects, processes and procedures relating to the enhancement of cultural legitimacy for children's rights within the community. Specifically, I enquired into the operations of and relationship between the institutions that were used for maintaining law and order within the community and peace within and between families. I also attempted to find out whether these institutions could be employed to improve the cultural legitimacy of children's rights.

In particular, the direct observation involved the passive observation of practices, proceedings, events and social functions which relate to children and their upbringing. Observing the subjects of the study as they interact with their community, their families, traditional authority or state officialdom helped reveal why certain events occur and what influenced the behaviour and attitudes of the community being investigated.<sup>40</sup>

Devising a fairly inconspicuous role was difficult in the beginning, with groups of young children always tailing me wishing to be taped by *mnyamata wa kaseti* or 'the boy with the recorder'. However, as time went on, I became boring and ceased being a subject of harmless curiosity. I was able to gain enough trust that my presence in itself was no longer a source of interesting and animated conversation. The observation was carried out at divers places and encounters such as funerals, a wedding, prayer meetings, football matches and the usual village meeting at the chiefs' compound. All of these events presented a rich and interesting source of data collection. For example, funerals, of which I attended four, are great places for sober conversation and, of course, hearing the latest village gossip. When there has been bereavement, the customary requirement is that members of the community congregate at the deceased's home to 'help the family members cry'. These gatherings go on day and night until burial. When night descends, the women move inside the house or the compound at the back of the house whilst the men are left to sit around fires that are lit outside the house. If the deceased is a Christian, which is

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<sup>40</sup>

As above at p 195.

usually the case in Magombo and Ndalama villages, the men are expected to sing hymns until dawn. However, the singing often gives way to muted conversation as people become tired with singing. The muted conversation gives way to loud conversation tinged with occasional bouts of laughter which again gives way to singing. Some of the topics tackled during these conversations included national politics and why all politicians are thieves; the importance of marrying an ugly girl; advice on how to deny responsibility for a pregnancy; a presentation on how lawyers undertake special courses in deceit; the importance of staying in school; the importance of staying unmarried for life; the importance of respect towards elders; an anecdote on how being rich makes one miserable. I found my 'funeral conversations' profoundly interesting because unlike my football or wedding conversations, they were not focused on a single subject such as the football match or the wedding. They were so unstructured, so spontaneous and so thought-provoking that I was tempted to ask my hosts to always inform me the venue of the next funeral.

Although a lot of information was gathered by passive observation, it was also important in many cases to contextualise events and encounters. Consequently, the direct observation was complemented by participant observation whereby I sought to gain firsthand involvement in the social world chosen for the study.<sup>41</sup> In this regard, data was collected through the participation in the ordinary activities of the village community.<sup>42</sup> One of my favourite pastimes in this regard was taking part in football matches at a bumpy clearing near Mpinji Community Day Secondary School. Almost every other day at around 3 o'clock in the afternoon, a sizeable group of boys would gather to have the customary kick-about. After watching the proceedings on at least seven occasions, I was invited to join Dennis' team. The verdict on my football skills was pronounced within ten minutes of my joining the football game: I could play a bit but they thought I was a little bit too fat to actually play. However, since there were not enough people to play, I would be left to continue playing anyway. Another regular activity which offered opportunities for conversation was the self-help development project that involved the building of a road bridge connecting Ndalama

<sup>41</sup> C Marshall & GB Rossman n 26 above at p 79.

<sup>42</sup> M Hammesley & P Atkinson *Ethnography: Principles in practice*, 2nd edition (Routledge: London, 1995) pp 139-151.



village with the *boma*. In the beginning, this involved the gathering of rocks for the building of the bridge's foundation and; eventually, the actual building itself. Thus, on many Saturday morning and Sunday afternoon, I often found myself hoisting rocks or buckets of sand at the bridge. In this and other activities, extensive notes were made on observations relating to behaviour, and salient points gathered from listening to what was said in conversations both between others and with me.<sup>43</sup>

The above data collection techniques were further supplemented by semi-structured interviewing often described by researchers as 'conversation with a purpose'.<sup>44</sup> This method of data collection enabled me pursue a few general topics to help uncover the participant's meaning perspective, but at the same time allowing the participants to frame and structure their responses in a way that was most suitable for them.<sup>45</sup> Furthermore, this technique allowed me to pose relatively more general questions than in a structured interview as well as retain the latitude to ask further questions in response to significant replies<sup>46</sup> or vary the sequence of questions depending on the flow of the conversation.<sup>47</sup> With regard to the focus groups, additional data was captured through essay writing activities that addressed various topics including, amongst other issues; democracy, children's rights, the duties of children within the home.

Whilst the identification of data collection methods and sampling procedures are crucial in accessing field data, the researcher needs to have at her or his disposal flexible data collection mechanisms.<sup>48</sup> Retaining a flexible design, this study relied on a variety of data recording techniques which included taking of field notes and the use

<sup>43</sup> MV Angrosino & KA Mays de Perez 'Rethinking observation: From method to context' in NK Denzin & YS Lincoln (eds) *Handbook of qualitative research* (Thousand Oaks, London, New Delhi: Sage Publications, 2000) at pp 673; PA Adler & P Adler 'Observational techniques' in NK Denzin & YS Lincoln (eds) *Handbook of qualitative research* (Thousand Oaks, CA: Sage Publications, 1994) p 377 at pp 388-390; JA Sluka 'Participant observation in violent social contexts' (1990) *Human Organisation* p 49 at p 114-126.

<sup>44</sup> R Kahn & C Cannell *Dynamics of interviewing* (New York: John Wiley, 1957) at p 149.

<sup>45</sup> A Bryman n 32 above at p 110; C Marshall & GB Rossman n 26 above at p 82.

<sup>46</sup> A Bryman n 32 above at p 110.

<sup>47</sup> R Kahn & C Cannell n 44 above at p 149.

<sup>48</sup> C Marshall & GB Rossman n 26 above at p 110.

of a tape recorder. This ensured that data recording activities did not interfere with the data collection activities such as observation or interview.<sup>49</sup> In some cases, the carrying of recording equipment led to suggestions that I was working for the government broadcaster or some government department. Consequently, before I begun any semi-structured interview, I explained the presence of the recording equipment and that if the potential interviewee was not comfortable with their voice being recorded, I would switch the machine off and put it away. One afternoon, after a lively conversation relating to discipline and rights with four mothers from Magombo village, I was asked to play back the recording so that the participants could hear what their responses and observations. During the playback, more opinions were given and many points elaborated.

### 3.6 Data analysis

Once the data was collected through the above methods, it was analysed using the analytical scheme developed by grounded theorists.<sup>50</sup> In qualitative studies, data collection and analysis go hand in hand to promote the emergence of substantive theory grounded in empirical data.<sup>51</sup> Whilst at first, I was guided by initial concepts and guiding hypotheses, my position certainly shifted and preconceptions were discarded as the data was collected and analysed. Once the data was collected, it was categorised and coded in order to generate concepts.<sup>52</sup> In the words of Charmaz, 'we grounded theorists code our emerging data as we collect it...Unlike quantitative research which requires data to fit *preconceived* standardised codes, the researcher's interpretations of data shape his or her emergent codes in grounded theory.'<sup>53</sup> More importantly, this kind of analysis called for constant comparison and constant movement backwards and forwards in order to produce 'the verification of

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<sup>49</sup> AW Bentzon *et al* n 26 above at pp 220-236.

<sup>50</sup> See generally, BG Glasser and AL Strasser n 33 above; and A Strauss & JM Corbin n 34 above.

<sup>51</sup> C Marshall & GB Rossman n 26 above at p 113.

<sup>52</sup> M Hammersley & P Atkinson n 46 above at pp 209-214.

<sup>53</sup> K Charmaz 'Grounded theory: Objectivist and constructivist methods' in NK Denzin & YS Lincoln (eds) *Handbook of qualitative research* (Thousand Oaks, CA: Sage Publications, 2000) p 509 at p 515. Emphasis in original.

substantive theory.’<sup>54</sup> The selected data collection methods significantly assisted in this analytical process.

I used data cards, post-its, and highlighters to create maps on the data and impose some structure on it. At the beginning of the fieldwork, I endeavoured to do this at the end of every research day but after about three weeks, I realised that it was difficult if not impossible to keep up. The haste to analyse and code data resulted in the loss of some important nuances and patterns that could only be revealed by careful analysis. In the end, I set aside Fridays and Saturday afternoons for data coding, Saturday mornings having been taken up by the customary rock hoisting. However, despite these efforts, I still had not gone through all the data by the time I concluded the data collection at the research site. There were several tapes that still needed transcribing and whose data needed structuring. This made for a busy winter when I returned back to London.

It is also imperative to ensure that the data recorded is verified. In the social sciences, this process is referred to as triangulation. Triangulation is the ‘act of bringing more than one source of data to bear on a single point. Derived from navigation science, the concept has been usefully applied to ethnographic enquiry.’<sup>55</sup> In order to achieve this, data from different sources may be used to corroborate, elaborate or illuminate the research in question.<sup>56</sup> Designing a study in which multiple cases are used, multiple informants or more than one data gathering technique greatly strengthens the study’s usefulness for other settings.<sup>57</sup>

In the context of this study, the various data collection methodologies outlined above were performed concurrently thereby providing multiple data sets from multiple sources. This diversity allowed data from each collection technique to be used to substantiate events, test hypotheses and make decisions about the research. As Becker and Geer point out, participant observation allows the researcher to check definitions

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<sup>54</sup> A Bryman n 32 above at p 393. See also AW Bentzon *et al* n 26 above at pp 182-185.

<sup>55</sup> C Marshall & GB Rossman n 26 above at p 146.

<sup>56</sup> GB Rossman & BL Wilson ‘Numbers and words: Combining quantitative and qualitative methods in large-scale evaluation study’(1983) 9(5) *Evaluation Review* pp 627-643.

<sup>57</sup> M Hammesley & P Atkinson n 42 above at pp 230-232.

of the terms the participant use in the interviews in a more natural setting (for example, during casual conversations with others). Secondly, it allows one to observe events the participants cannot report because 'they do not want to, feeling that to speak would be impolitic, impolite or insensitive.' Finally, it permits the researcher to observe situations described in interviews and thus become aware of distributions described by the participants.<sup>58</sup> Consequently, the multi-variant and flexible data collection and data sourcing strategies adopted by this study assisted in triangulation by offering comparative data sets and sources.

#### **4 Concluding remarks: Analysing methodology in children's rights research**

The attempt to incorporate some grounded analysis into this thesis provided an opportunity to evaluate attempts to situate children at the centre of children's rights analysis. Whilst I was largely successful at obtaining what *I* had set out to do, profound questions relating to the appropriate role that children occupy in research endeavours such as the present one remain unanswered. I address some of these questions in this concluding part of the methodology review.

Starting from the design phase into the data collection and analysis, and presentation of research results; several structural and methodological factors served to limit the participation of children in the study. For example, the design of the research plan did not involve any input from children but relied on my own appraisal on what sort of questions I needed to investigate in analysing the cultural legitimacy of the African Children's Charter. Whilst the planning stages of fieldwork research could benefit from children's input, consideration of what constitutes acceptable research practice and output to funding bodies or examining bodies restricts the participation of children during this part of the research process. Although some modifications to specific aspects of the design were possible as the fieldwork was conducted, major revision of the principal methodological approach could not be undertaken.

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<sup>58</sup> HS Becker & B Geer 'Participant observation and interviewing: A comparison' in GJ McCall & JL Simmons (eds) *Issues in participant observation: A text and a reader* (Reading, MA: Addison-Wesley, 1969) p 322 at p 326.

Consequently, it could be claimed that this study, was based upon an adult-determined perception of how questions on children's rights and cultural legitimacy should be investigated.

Similarly, during the fieldwork, it was clear that children's participation was mediated through those holding positions of power over children. My principle means of identifying and contacting children was through their teachers, parents and guardians. Often, the consent of these gatekeepers also translated into the consent of participating children. I discussed this very issue with the focus group at Thyolo Secondary School. One of the members, Caesar Muluta, expressed the view that it was important to be seen as 'a good boy' in class and refusing to take part in the research would certainly subtract some points to the teacher's good book. Tiyamike Mayuni, another member of the focus group had another view. According to her, her parents taught her that when someone needs help and one is in a position to help, then he or she must do so. She saw that I needed help and volunteered because she wanted to help.

Whatever the explanation, it is clear that children's participation in this study was negotiated largely with those who exercised control over them. Whereas none were coerced into taking part and in some cases the invitation to take part was declined, the location of children in institutions such as the family, school or church and the structure of power relations in these institutions seems to have predisposed children towards compliance with adult's requests. The lack of power for children to negotiate the terms of social interaction has an impact not only on a research process like this but also in the manner in which their rights are prescribed and enforced.

As I explained above, I attempted to conduct the analysis of the data as the research progressed. However, because of data volumes and compressed time frames, the bulk of the analysis was conducted offsite. As I conducted the analysis, I began to structure into the framework of this thesis. At this stage of the thesis, the participation of children and indeed the adults that took part in the fieldwork was conspicuously absent; and I found it challenging to maintain the children's language and perspective in the consideration of issues that I had raised. As I struggled through the solitude of thesis writing, the urge to present the study in the familiar language of children's

rights (which is more the language of lawyers than ordinary folk) meant that I had to engage in a process of interpreting the data and sifting it through the sieve of children's rights talk. Again, this impacts on the level of participation that children have in this study.

In recognising these limitations in children's rights research, I am not suggesting that the fieldwork or the library-based methods were unsuccessful. On the contrary, the fieldwork uncovered perspectives on the cultural legitimacy of children's rights that would not have been through library-based methods alone. The compromises made in designing the methodology, accessing the fieldwork data and analysing it are not unusual and they do not invalidate in anyway the perspectives of young people that were kind enough to take part in this study. The point of the observations above is that grounded research, whilst crucial in providing perspectives that may not be obvious through strict international law methods, is not a panacea to developing linkages between the study of children's rights and the reality of children's daily lives. Developing such linkages requires the constant appraisal of accepted research practice as well as the development of innovative methods that attempt to capture the institutional and social character of children's rights. The combination of international law methods with socio-legal, as this study has done, is an example of such endeavours.

Having discussed the methodological approach that will be utilised in this study, I will now turn to the African Children's Charter in the following chapter by assessing the Charter's position in general human rights discourse.

## Chapter 4

### The African Children's Charter: Beyond relativism and universalism

#### 1 Introduction

As observed in the previous chapter, the African Charter on the Rights and Welfare of the Child ('the African Children's Charter' or 'the Charter')<sup>1</sup> is a derivative instrument. It therefore forms part of a long line of international and regional instruments aimed at the promotion and protection human rights. More importantly, however, the Charter forms an integral part of an ever evolving general conversation about how best to achieve the dignity and self-worth of human beings through the protection of human rights. One of the most enduring and perhaps most important elements of this general conversation is the debate between universalism and relativism which focuses on the relative merits of adopting a universal system of rights in comparison to protecting cultural diversity. This debate has introduced a number of key concepts that almost invariably come up in discussions concerning the application of human rights in specific local contexts. Analysis of these key concepts, which include culture, cultural legitimacy, and of course; universalism and relativism, offers interesting insights into the interrelationship between the two paradigms and provides tools for understanding not only the intricate workings of the international human rights framework but also its relevance as a framework for ordering relationships between individuals, the state and institutions.

In light of the African Children's Charter's concomitant focus on universal children's rights principles as well as local traditions and practice, this chapter seeks to locate the Charter within this crucial debate and evaluate its overall contribution to this general conversation regarding the promotion and protection of human rights. The chapter does this by employing the key concepts mentioned above and highlighting how these

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<sup>1</sup> African Charter on the Rights and Welfare of the Child, adopted July 1990 (entered into force 29 November 1999) OAU Doc.CAB/LEG/24.9/49 (1990).

concepts relate to the African Children's Charter's philosophy and provisions. Consequently, the chapter begins by an analysis of the concept of culture and how it relates to children's rights protection. The third part of the chapter considers the concept of cultural legitimacy and elucidates how the concept affects public policy action in favour of the protection and promotion of children's rights. The importance of cultural support for normative prescriptions is well illustrated by the debate between universalists and relativists. Consequently, the fourth part of the chapter briefly introduces the key ideas of this debate and then analyses how concern with culture, cultural legitimacy and universality have influenced the content as well as the philosophy behind the African Children's Charter.

## 2 The concept of culture and its relevance for children's rights

Culture plays a very crucial role in all human societies whatever their level of development, religious or ideological orientation, or forms of political organisation.<sup>2</sup> As Pearce and Kang point out, 'to be human is to have been enculturated to some specific culture whose characteristics have been internalised.'<sup>3</sup> Since culture touches every facet of human existence, it is therefore defined in a variety of ways in different contexts and from different perspectives<sup>4</sup> as becomes apparent from a sampling of the literature from the social sciences.<sup>5</sup> In this regard, some of the definitions emphasise social heritage

<sup>2</sup> AA An-Naim & J Hammond 'Cultural transformation and human rights in African societies' in AA An-Naim & J Hammond (eds) *Cultural transformation and human rights in African societies* (London: Zed Books Ltd, 2000) p 13 at p 21.

<sup>3</sup> WB Pearce & K Kang 'Conceptual migrations: Understanding travellers' tales for cross-cultural adaptation' in YY Kim & WB Gudykunst (eds) *Cross-cultural adaptation: Current approaches* (Newbury Park, CA: Sage, 1988) p 20 at p 29.

<sup>4</sup> See generally TS Elliot *Notes towards the definition of culture* (London: Faber and Faber, 1948); R Williams *Keywords: A vocabulary of culture and society* (New York: Oxford University Press, 1976).

<sup>5</sup> The social sciences have contributed tremendously to the understanding of people and their cultures because of their human- and society-centred methodologies. See generally AL Kroeber & C Kluckhohn, C (eds) *Culture: A critical review of concepts and definitions* (New York: Vintage Books, 1963).



whilst others stress shared ideas or shared behaviours and so on. For example, Malinowski suggests that culture can generally be seen to comprise the 'inherited artefacts, goods, technical processes, ideas, habits and values' of a given society and which endows human beings 'with an additional extension of [their] anatomical apparatus, with a protective armour of defences and safeguards, and with mobility and speed.' Culture, it is further posited, is the cumulative creation of human beings 'which transforms individuals into organised groups and gives these groups an almost indefinite continuity.'<sup>6</sup>

An-Naim suggests that we use the term culture in what he calls 'its widest meaning' denoting 'the totality of values, institutions and forms of behaviour transmitted within a society, as well as the material goods produced by men [and women] ... This wide concept of culture covers *Weltanschauung* [worldview], ideologies and cognitive behaviour.'<sup>7</sup> With this broad definition of culture, An-Naim does not mean to suggest that culture is everything but rather that 'there is a cultural dimension to every aspect of human activity.'<sup>8</sup> Culture is therefore a source of the individual and communal worldview. It provides both the individual and the community with the values and interests to be pursued in life, as well as the legitimate means of pursuing them. It stipulates the norms and values that contribute to people's perception of their self-interest and the goals and methods of individual and collective struggles for power within a society and between societies.<sup>9</sup> As such, culture is a primary force in the socialisation of

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<sup>6</sup> B Malinowski 'Culture' (1931) 4 *Encyclopaedia of Social Sciences* p 621.

<sup>7</sup> AA An-Naim 'Towards a cross-cultural approach to defining international standards of human rights: The meaning of cruel, inhuman or degrading treatment or punishment' in AA An-Naim (ed) *Human rights in cross-cultural perspectives: A quest for consensus* (Philadelphia: University of Pennsylvania Press, 1991) p 19 at p 23 quoting Preswick (1978) p 251.

<sup>8</sup> AA An-Naim 'Problems of universal cultural legitimacy for human rights' in AA An-Naim & FM Deng (eds) *Human rights in Africa: Cross-cultural perspectives*, (Washington D.C.: Brookings Institution, 1990) p 331 at pp 335-336.

<sup>9</sup> AA An-Naim & J Hammond n 2 above at p 22.

the individual and a major determinant of the consciousness and experience of the community. As Geertz observes, without culture or enculturation:<sup>10</sup>

[H]uman beings would be unworkable monstrosities with very few useful instincts, fewer recognisable sentiments, and no intellect; mental basket cases. As our central nervous system...grew up in great part in interaction with culture, it is incapable of directing our behaviour or organising our experience without the guidance provided by systems of significant symbols...Such symbols are thus not mere expressions, instrumentalities or correlates of our biological, psychological and social existence, they are prerequisites of it.

Amplifying this understanding of the role of culture as a system of symbols, Geertz defines culture as 'historically transmitted patterns of meaning, embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate and develop their knowledge about and attitudes towards life.'<sup>11</sup>

Lindholm explains these observations further by pointing out that in any social group there are certain routines of practice which include skills, competencies, the exercise of rules or formulation of frameworks, opinions, aspirations, sensibilities, roles or institutions. These routines are taken for granted and shared as a matter of course. Newcomers to the group have no viable alternative but to acquire those routines of practice if they are to have access to the activities and experiences that define social practice. As historical social structures, traditions are shared and unquestioned routines which are reproduced by the individuals in a given generation, passed on to newcomers who are included in the group as they are born or become assimilated into the group.<sup>12</sup> Thus, culture is learned and shared behaviour which helps systematise the way people go about their lives.<sup>13</sup> Culture establishes a set pattern of belief and assumptions by means of

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<sup>10</sup> C Geertz, *C The interpretation of cultures* (New York: Basic Books, 1973) at p 49.

<sup>11</sup> As above.

<sup>12</sup> T Lindholm 'Coming to term with tradition' in H. Hoibraden & I Gullvag (eds) *Essays in pragmatic philosophy* (Oslo: Norwegian University Press, 1985) p 103 at p 110.

<sup>13</sup> G Fisher *Mindsets: The role of culture and perception in international relations* (Yarmouth, ME: Intercultural Press, 1988) at p 46.

which everyone can project their perceptions and expectations onto other people without thinking about it. This in turn provides consistency, predictability and stability by simplifying social interaction.<sup>14</sup>

Whilst this view of culture is fundamentally correct, it is vital to avoid conceptualising culture 'as a static, homogenous, and bounded entity defined by its specific "traits"'.<sup>15</sup> In this regard, Preis argues that cultures are not quantifiable things that sometimes happen to come into contact with each other. Instead, culture is at once a dynamic process and specific practice without discrete boundaries. She notes:

Although the classic vision of unique cultural patterns has proven merit, its limitations are seen today as serious indeed. Most importantly, this vision emphasises shared patterns at the expense of processes of change and internal inconsistencies, conflicts and contradictions.

Lindholm concedes this point when he observes that social practices are reproduced and transformed only through the activities of individuals, and are suspended or discontinued when the upholders of a given tradition entertain viable alternatives to it.<sup>16</sup> His main point in this regard is that traditions are reproduced only through intentional human agency and not as something that exists independently outside of the participants within a particular culture.

Nyamu-Musembi lends her weight behind the importance of human agency and against a deterministic conception of culture. Drawing upon the findings of her research on women's property rights in Kenya, she observes that 'the dynamism reflected in the variation and flexibility that abound in actual social practice point to the fact that culture

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<sup>14</sup> As above.

<sup>15</sup> See generally AS Preis 'Human rights as cultural practice: An anthropological critique' (1996) 18 *Human Rights Quarterly* 286 p 289.

<sup>16</sup> T Lindholm 'Coming to terms with tradition' in H. Hoibraden & I Gullvag (eds) *Essays in pragmatic philosophy* (Oslo: Norwegian University Press, 1985) p 103. at p 108.

is not deterministic.<sup>17</sup> In her view, human actors do possess the agency that enables them to act against established cultural expectations, and, 'therefore opening up the possibility of the departure from interpretations of culture that go against human rights principles.'<sup>18</sup>

The above analysis points out one crucial characteristic of culture that is more often than not omitted in definitions and discussions concerning the concept. This aspect of culture highlights not only its resilience and endurance but also its permeability and flexibility. In this regard, it is important to note that all cultures are 'eclectic, dynamic, and subject to significant alteration over time.'<sup>19</sup> They are susceptible to and do respond to influence by social, economic and political forces. Thus culture is neither a monolithic nor unchanging set of practices. In fact, according to An-Naim, one of the apparent paradoxes of culture is the way it combines stability with dynamic continuous change.<sup>20</sup> As Herskovitz correctly observes, 'culture is flexible and holds many possibilities of choice within its framework...[T]o recognise the values held by a given people [at a particular period] in no way implies that these values are a constant factor in the lives of succeeding generations of the same group.'<sup>21</sup>

Thus culture and cultural practices are not immutable but rather are inherently responsive to new ideas and ways of doing things suggested by external influences or required by

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<sup>17</sup> C Nyamu-Musembi 'Are local norms and practices fences or pathways? The example of women's property rights' in AA An-Naim & J Hammond (eds) *Cultural transformation and human rights in African societies* (London and New York: Zed Books Ltd, 2002) p 127 at p 134.

<sup>18</sup> As above at p 135.

<sup>19</sup> B Ibhawoh 'Between culture and constitution: Evaluating the cultural legitimacy of human rights in the African state' (2000) 22 *Human Rights Quarterly* p 838 at p 841.

<sup>20</sup> AA An-Naim n 7 above at p 27 quoting MJ Herskovitz *Cultural dynamics* (New York: Knopf, 1964) at pp 4 & 6.

<sup>21</sup> MJ Herskovitz n 20 above at pp 49-50. See also J Eekelaar 'Children between cultures' (2004) 18 *International Journal of Law, Policy and the Family* p 178 at p 182 observing on the changing nature of 'black' identity.

internal needs.<sup>22</sup> Similarly, Hitchcock aptly captures the shifting yet very settled nature of culture when he posits that:<sup>23</sup>

Culture, shared meanings, practices, and symbols that constitute the human world, does not present itself neutrally or with one voice. It is always multi-vocal and over-determined, and both the observers and the observed are always enmeshed in it... There is no privileged position, no absolute perspective, no final recounting.'

Applying the above analysis to the promotion and protection of the rights and welfare of the child, one may argue that adherence to or violation of children's rights norms as set out in the African Children's Charter will be reflected in the cultural practice of the community under consideration. In other words, children's rights are themselves facets of culture or cultural practice, symbols of interaction, and shared routines of practice. In communities where the shared routines of practice already accept symbols of interaction that reflect or resemble the prescribed norms of children's rights, the implementation of the standards that are embodied in the African Children's Charter will not be problematic in comparison to those communities that do not already have or observe such symbols of interaction. However, in the latter type of social setting, the implementation of the African Children's Charter may prove harder because the symbols that represent children's rights protection are yet to be introduced and allowed to gain acceptance.

The absence of cultural routines which are conducive to the protection of children's rights may mean that there exist practices and observations which run counter to the protection of the rights and welfare of the child such as son-preference, female circumcision or such like. Consequently, the introduction of alternative norms is likely to be perceived as a threat to the established cultural patterns and routines. However, since culture is responsive to human agency, state and civil society action towards the adoption

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<sup>22</sup> B Ibhawoh n 19 above at p 841.

<sup>23</sup> RK Hitchcock 'Anthropological research and remote area development among the Botswana baSarwa' in RK Hitchcock, QN Parsons & J Taylor (eds) *Research development in Botswana* (Gaborone: Botswana Society, 1985) p 285 at p 286.

of practices that support the protection of children's rights and welfare are also likely to gradually gain acceptance.

One benefit of conceptualising children's rights as a set of cultural practices is that such a stance emphasises their adaptability. Because the African Children's Charter lays down only minimum standards which are stated in the broadest terms, each act of application requires modification and adjustment. As such, children's rights standards must certainly be moulded by the exigencies of local culture taking into consideration the specific dynamics of the community concerned.

### **3 Cultural legitimacy and its relevance for children's rights in Africa**

Cultural legitimacy denotes the quality of being in conformity with the accepted principles or rules and standards of a particular culture. The defining characteristic of cultural legitimacy is the authority and reverence derived from internal validity.<sup>24</sup> A culturally legitimate norm, rule or value is respected and observed by members of the particular culture, presumably because it is assumed to bring benefits (whether real or imagined, tangible or intangible) to the members of that particular culture. The corollary of this is that a rule or norm which does not command adequate legitimacy will not enjoy sufficient observance or support. Such a rule is more likely to be breached than observed.

As was noted above, the difficulties in implementing children's rights standards as charted down in the African Children's Charter derive in part from the insufficiency of cultural support for the set of social practices that comprise the particular claims or rights.<sup>25</sup> The level of cultural support for any particular norm on the rights and welfare of the child will be different at the international, regional, national and local level. Whilst strategies for securing the cultural legitimacy at any of these levels will be aimed at the same result: the enjoyment of the rights by children; the strategies employed at any of these levels will be different to suit the dynamics of the context under consideration.

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<sup>24</sup> AA An-Naim n 8 above at p 336.

<sup>25</sup> As above at p 337.

At the international or regional level, the drafting adoption and ratification of instruments on the rights and welfare of the child may be the surest way of gauging the legitimacy of children's rights standards. The situation may not be the same at the national or local level. In this context, the mere adoption of formal texts or the passing of legislation on rights and welfare of the child may not be indicative of consensus or the raised legitimacy of children's rights within the community. Consequently, more grounded approaches towards implementation need to be adopted to supplement and bolster the formal processes of ratification or legislating. In addition to providing a set of laws on the rights and welfare of the child, the enhancement of the cultural legitimacy for this category of human rights will also serve to mobilise political and social forces within a community, inducing those in power to accept accountability and responsibility for the implementation and enforcement of children's rights.

There are benefits associated with seeking to raise the cultural legitimacy of children's rights within the various African states that have subscribed to the standards promulgated by both the African Children's Charter. In the first place, enhancing the cultural legitimacy of children's rights motivates individuals and communities to take action in favour of the rights and welfare of the child as this is now viewed as a legitimate goal or interest. Because individual action is the ultimate resource at the disposal of any given society, such motivation evokes the mental attitude that accepts children's rights norms as worth working for.

Secondly, the mobilisation of individuals influences political forces within the community thereby inducing those in power to accept accountability for the implementation and enforcement of the rights and welfare of the child. Because of its juridical sovereignty, extensive powers and relatively much larger resources, the state is a key element in the struggle for children's greater protection. Consequently, if there is sufficient support for agendas aimed at providing better protection for the rights and welfare of the child, state policy, programmatic and resource intervention are likely to follow.

Thus, an effective implementation strategy for the rights and welfare of the child needs the collaborated efforts of both the state and the individual. The African Children's Charter takes this dichotomy into account by emphasising state obligations on the one hand and positing African cultural heritage as underlying the whole philosophy of the rights and welfare of the African child. In this regard, article 1 of the Charter calls upon all States Parties to recognise the rights, freedoms and duties enshrined in the Charter and to undertake all necessary steps to adopt measures that will give effect to the Charter. At the same time paragraph 6 of the preamble states that the concept of the rights and welfare of the child should be characterised by the virtues of African cultural heritage and inspired by African civilisation. By positing African culture and civilisation as the inspiration for the protection and promotion of the rights and welfare of the child, the African Children's Charter takes into account the need for cultural legitimacy in implementing children's rights standards and of the need for enhancing it where cultural support is weak. The appeal to tradition and African civilisation is meant to increase the sense of ownership of the African Children's Charter as well as of the standards which it elaborates and thereby enhance the legitimacy of the rights and welfare of the child. In this regard, the African Children's Charter attempts to strike a balance between the need for recognition of universal human rights standards on the one hand and of the need to respect local values on the other.

It should be noted that the fundamental value underlying the African Children's Charter is the notion of the inherent dignity and integrity of every African child. All the civil and political as well as the cultural rights recognised by the instrument are the necessary implications or practical manifestation of the inherent dignity and integrity that every child should have. The intrinsic value attached to the human dignity and the integrity of human beings may be traced throughout the value and belief systems of the cultures that constitute the human race. All human beings and societies share certain fundamental interests, concerns and values that can be identified and articulated as the framework for a common culture of universal human rights.<sup>26</sup>

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<sup>26</sup> See AA An'Naim n 7 above at p 19.



In Africa, traditional value systems recognise human dignity and integrity of the individual as fundamental values.<sup>27</sup> The concept entails that all humans, by virtue of being human alone, are entitled to humanity, respect and dignity.<sup>28</sup> These principles and ideals manifest themselves in traditional society's responsibility to provide for the security and survival needs of its members.<sup>29</sup> Although the concept is not structured in western or eurocentric terms, African traditional culture supports the idea and practice of human rights.<sup>30</sup>

In relation to children, this African conception of human rights has manifested itself in the recognition that children are a valuable part of the society.<sup>31</sup> Capturing the essence of such recognition, the Swazi proclaim that *bantfwana bangulimba loya embili*; the Nyanja declare *ana ndiwo tsogolo lathu*; the aBanya'rwanda insist *abana nibo rwanda rwejo*. Literally translated, all of these expressions mean that 'children are the future' and they convey the notion that children must be well protected and nurtured otherwise without them, society will die. Thus, African traditional culture recognises the intrinsic worth of children and of the need to protect them.

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<sup>27</sup> See generally DM Wai 'Human rights in sub-Saharan Africa' in A Pollis & P Schwab (eds) *Human rights: Cultural and ideological perspectives* (New York: Praeger, 1979) at p 115.

<sup>28</sup> See M Mutua 'The Banjul Charter and the African fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* p 339 at pp 346-358; FM Deng 'A cultural approach to human rights among the Dinka' in AA An-Naim & FM Deng (eds) (1990) p 266.

<sup>29</sup> A Pollis 'Cultural relativism revisited: Through a state prism' (1996) 18 *Human Rights Quarterly* 316 at p 342. See also PJ Magnarella 'Assessing the concept of human rights in Africa' (2001) 1 *Journal of Human Rights and Human Welfare* p 25.

<sup>30</sup> AS Preis n 15 above at p 286.

<sup>31</sup> A Armstrong *et al* 'Towards a cultural understanding of the interplay between children's and women's rights: An eastern and southern African perspective' (1995) 3 *International Journal of Children's Rights* p 333 at p 336.

More importantly, however, African culture recognises childhood as a special, precarious and weak stage of the human being which requires special protection.<sup>32</sup> This perception is translated into the traditional responsibility to provide for the security and survival needs<sup>33</sup> of the children and ensure their physical and psychological well-being.<sup>34</sup> It is thus obvious that the survival and development of children are legitimate goals of traditional society.

Based on the above observations, it is concluded that the protection of children's rights is not a concept which is alien to African traditional culture. Consequently, international human rights principles relating to the protection of the child do find support within both the African cultural conception of human rights and the construction of childhood. In short, children's rights discourse is a culturally legitimate enterprise within the African cultural context.

#### **4 Cultural relativism and the universality of human rights: The debate and its relevance for children's rights**

Any consideration of universalist and relativist conceptions of human rights must necessarily be grounded in the historical origins and development of the theory of human rights.<sup>35</sup> In this regard, it is often argued that the doctrine of human rights rests upon a particular fundamental philosophical claim which holds that there exists a rationally

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<sup>32</sup> W Ncube 'The African cultural fingerprint? The changing concept of childhood' in W Ncube (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (Ashgate: Dartmouth, 1998) p 11 at pp 24-26.

<sup>33</sup> Thus, for example, the birth of a child will be greeted with elaborate procedures whereby ancestors who live in the spirit world are called upon to take care of the child as it makes its journey through life. Ceremonies which ensure this protection are conducted throughout the child's life.

<sup>34</sup> I Kellner, 'Under the knife: Female genital mutilation as child abuse' (1993) *Journal of Juvenile Law* p 118.

<sup>35</sup> C Cerna 'Universality of human rights and cultural diversity: Implementation of human rights in different socio-cultural contexts' (1994) 16 *Human Rights Quarterly* p 740.

identifiable order, an order whose legitimacy precedes contingent social and historical conditions and applies to all human beings *everywhere and at all times*.<sup>36</sup> In this regard, it is further posited that the moral beliefs and concepts which constitute this 'identifiable moral order' are capable of being objectively validated as fundamentally and universally true. Although there exist several strands of moral universalism, the contemporary doctrine of human rights has drawn from most of them because the doctrine rests upon the existence of a truly universal moral community comprising all human beings.<sup>37</sup>

Although today the universal nature of human rights is often stated and taken for granted, it is at the same time undeniable that cultural relativity applies at differing levels in the world.<sup>38</sup> It is, therefore, unsurprising that despite an impressive list of standard-setting achievements, a 1993 UN conference on human rights should only manage to awkwardly capture this paradox. The resultant document from that conference, the Vienna Declaration and Programme of Action ('the Vienna Declaration'),<sup>39</sup> states that:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.<sup>40</sup>

This legal-diplomatic vindication of the principle of universality was in reaction to a statement by Asian states adopted at the World Conference Regional Preparatory Meeting in April 1993: the Final Declaration of the Regional Meeting for Asia of the

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<sup>36</sup> See generally J Donnelly 'Cultural relativism and universal human rights' in J Donnelly (ed) *Universal human rights in theory and practice* (Ithaca: Cornell University, 1989) p 109.

<sup>37</sup> As above.

<sup>38</sup> Declan O'Sullivan 'Is the Declaration of Human Rights universal?' (2000) 4 *Journal of Human Rights* p 25.

<sup>39</sup> Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23; 32 ILM 1661 (1993).

<sup>40</sup> Vienna Declaration, article 5.

World Conference on Human Rights ('the Bangkok Declaration')<sup>41</sup> wherein Asian states recognised 'that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical and religious backgrounds.'<sup>42</sup> The Vienna Declaration is not the first international document to proclaim the universality of human rights. There is a long line of authorities which drive this point home and the UDHR proudly stands at the apex of these sources. It proclaims the Declaration 'as a common standard of achievement for all peoples and all nations' and calls upon all states 'to promote respect for [the] rights and freedoms [contained in the Declaration] and by progressive measures, national and international, to secure their universal and effective recognition and observance.'<sup>43</sup>

However, this proclaimed universality has always been contested on many fronts. In 1948, immediately after the adoption of the UDHR, the American Anthropological Association published the now oft-cited statement authored by the prominent anthropologist Melville Herskovitz rejecting the universality of international human rights norms and in particular 'the applicability of any Declaration of Human Rights to mankind as a whole.'<sup>44</sup> The statement declared that '[t]he rights of Man in the Twentieth Century cannot be circumscribed by the standards of any single people or culture, or be dictated by the aspirations of a single people.'<sup>45</sup> If this were the case, it was claimed, it would only 'lead to frustration, not the realisation of the personalities of vast numbers of human beings.'<sup>46</sup>

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<sup>41</sup> Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights A/CONF.157/ASRM/8, A/CONF.157/PC/59 (7 April 1993). See also Bilahari Kausikan, 'Asia's different standard' (1993) 92 *Foreign Policy* p 24 at p 32.

<sup>42</sup> Bangkok Declaration, para 8.

<sup>43</sup> UDHR, preamble.

<sup>44</sup> MJ Herskovitz n 20 above at p 542.

<sup>45</sup> As above at p 543.

<sup>46</sup> As above.

The anthropological criticism of the UDHR may be characterised as a relativist position which arose out of the anthropologists concern for the respect and protection of the integrity of non-western cultures in the face of European imperialism and American domination.<sup>47</sup> These scholars maintained that ethical principles and moral standards emerge out of and are articulated within specific cultural contexts, shifting from culture to culture; and, therefore, that as such 'extra-cultural' standards of moral judgements are not possible. Instead 'moral judgements of good or bad are only possible within a given culture, because such judgements refer only to compliance or non-compliance with that culture's norms.'<sup>48</sup>

These two divergent opinions-that on the one hand, human rights are universal; and on the other hand, that they are relative to cultural contexts - 'has pervaded the [anthropology] discipline as an ethical undercurrent despite the emergence of different schools of thought and various theoretical directions.'<sup>49</sup> Although relativism and universalism are often presented as two opposite and irreconcilable moral or epistemological standpoints as regards human rights, the position is more nuanced than some of the scholarly contributions would seem to suggest.<sup>50</sup> As the following analysis will demonstrate, it is not possible to consider either position in isolation of the other, thereby demonstrating the interrelatedness of both these worldviews.

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<sup>47</sup> DJ Fox 'Anthropology and women's human rights' in D Fox & N Hasci (eds) *The challenges of women's activism and human rights in Africa* (Lewinston, Queenstown, Lampeter: Edwin Melen Press, 1999) p 39.

<sup>48</sup> MH Salmon (1997) 'Ethical considerations in anthropology and archaeology or relativism and justice for all' (1997) 53 *Journal of Anthropological Research* p 47.

<sup>49</sup> AS Preis n 15 above at p 287.

<sup>50</sup> M Dembour 'Following the movement of a pendulum: between universalism and relativism' in M Dembour; J Cowan & R Wilson (eds) *Culture and Rights: Anthropological Perspectives* (Cambridge: Cambridge University Press, 2001) p 56.

#### 4.1 Cultural relativism and the relevance of cultural context

The major dilemma that scholars have had to grapple with is that on one side the belief prevails that if human rights are the inherent possession of each individual, due to the fact that they are human, then by definition they must also be universal.<sup>51</sup> For example, Donnelly insists that for human rights to inhere in an individual, he or she need do nothing more than simply be human.<sup>52</sup> Relativists point out to the particular western, Judaeo-Christian philosophy and historical circumstances from which human rights arose. They remind us that beyond western philosophy and the western world generally, lies the vast majority of the globe which, is to a great extent, remote and separate from all that is North-American, western European or Austral-Asian.

Vincent argues that although this vast array of countries may have been subjugated by the colonisers in the past, and westernised to varying degrees of western cultural domination, there is still very much alive a feeling of indigenous identity. A large part of this non-western world does not share or seek to share, western values or belief systems.<sup>53</sup> He further claims that in the years following the demise of European imperialism, an added vitality emerged to boost the idea of plurality of values that exist in world politics and this has enhanced a rediscovery of traditional culture. Consequently, any moral argument which claims universal application such as the idea of human rights must necessarily seek and ultimately ground its legitimacy across these different cultural milieus, otherwise any such claim to universality must be viewed as lacking solid foundation.

The emphasis on cultural relativism in modern anthropological literature evolved as a reaction against cultural evolutionism.<sup>54</sup> This anthropological theory ranked societies

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<sup>51</sup> Declan O'Sullivan n 38 above at p 27.

<sup>52</sup> J Donnelly *International human rights* (Boulder, Colorado and Oxford: Westview Press, 1998) at p 18.

<sup>53</sup> R Vincent *Human rights in international relations* (Cambridge: Cambridge University Press, 1986) at p 37.

<sup>54</sup> MH Salmon n 48 above at p 47.

along an absolute evolutionary trajectory, from the so-called savage or primitive cultures of Africa and native North America to the so-called civilised or modern cultures of Europe.<sup>55</sup> Rejecting these racist notions of development, anthropologists developed the idea of cultural relativism to offer a more objective study of societies.

Although there are various formulations of cultural relativism, some of which are considered to be problematic, the basic thrust of the theory is clear and useful. '[Cultural relativism] is aimed at getting people to admit that although it may *seem* that their moral principles are self evidently true and hence seem to be grounds for passing judgement on other peoples, *in fact* the self-evidence of these principles is a kind of illusion.'<sup>56</sup> According to its strongest proponents, cultural relativism acknowledges the equal validity of diverse patterns of life, and lays stress on the dignity inherent in every body of custom and on the need for tolerance of conventions though they may differ from one's own.

Donnelly divides cultural relativism into two categories: strong and weak.<sup>57</sup> Strong relativists deny the existence of any universal conception of human rights and insist on great breadth of variation for most rights. Most importantly, they argue that it is very much possible to have two equally justifiable sets which might overlap only ever so slightly. Weak cultural relativists, on the other hand, maintain that culture is certainly an important source of the validity of morals and rights, but they accept a weak notion of universality.<sup>58</sup>

The main attack against relativism targets what is perceived to be its logical contradiction. Donnelly demonstrates this by pointing out that if human rights are based in human nature and are applicable to all due to the fact that they are human-and if this

<sup>55</sup> AA An-Naim n 7 above at p 331. See also GW Stocking *Race, culture and evolution: Essays in the history of anthropology* (New York: Free Press, 1968) at pp 115-117.

<sup>56</sup> J Cook 'Cultural relativism as an ethnocentric notion' in R Beehler & AR Drayson (eds) *The philosophy of society* (London: Methuen, 1978) p 294.

<sup>57</sup> J Donnelly 'Cultural relativism and universal human rights' (1984) 6 *Human Rights Quarterly* p 400 at p 401.

<sup>58</sup> Declan O'Sullivan n 38 above at p 28.

human nature is universal-then human rights cannot be relative in any fundamental way.<sup>59</sup>

Dembour attacks the idea of cultural relativism by unmasking the concept of culture that underlies the relativist position on human rights.<sup>60</sup> Like Preis, she objects to the characterisation of cultures and societies as homogenous bounded entities.<sup>61</sup> She observes that quite commonly, the term culture is used to refer to a traditional mode of living shared by a group, in a way that fails to take into account historical changes and the absence of completely fixed boundaries around any human group. The dynamism reflected in the variation and flexibility that abound in actual social practice points to the fact that culture is not as deterministic as cultural relativists would like others to believe.<sup>62</sup> In this regard, Nyamu-Musembi notes that culture is 'not something floating above people's heads and conditioning their actions.'<sup>63</sup> In fact, individuals are very active participants within social practice and are agents of cultural transformation.<sup>64</sup>

Another charge levelled against relativism is that it proposes a stark ideological divide between the collective or communitarian philosophy of 'traditional' societies and the individuality of the West. The argument is pursued that many non-Western societies such as those in Africa are community or group-oriented rather than individualistic, and hence universalist expositions of human rights which focus on the individual are irrelevant to

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<sup>59</sup> J Donnelly n 57 above at p 403.

<sup>60</sup> M Dembour n 50 above at p 58.

<sup>61</sup> M Dembour n 50 above at p 59. See also AS Preis n 15 above at p 288 arguing that the relativists 'underlying assumption of 'culture' as a homogenous, integral and coherent unit' is fundamentally wrong.

<sup>62</sup> M Dembour n 50 above at p 59.

<sup>63</sup> C Nyamu-Musembi n 17 above at p234.

<sup>64</sup> See generally C Ratner 'Agency and culture' (2000) 30 *Journal for the Theory of Social Behaviour* p 413.



these.<sup>65</sup> According to Dembour, this representation refuses to recognise the participants in these non-western cultures as 'purposeful agents.' In her view, the stark divide posited between the West and the rest of the world simply does not exist.<sup>66</sup>

## 4.2 Universalism and human rights

The idea of universality is often associated with the definition of the concept of human rights itself. For example, Cranston conceives of human rights as a right which is universal and held by all persons.<sup>67</sup>

A human right is by definition a universal moral right, something which all men, everywhere, at all times ought to have, something which no one may be deprived without a grave affront to justice, something which is owing to every human being.

Ashford offers a similar analysis. He identifies what he calls three characteristics of human rights:<sup>68</sup>

First, it must be universal, belonging to everyone throughout time. There can be no special rights attributable to only some. Second, it must be absolute. It cannot be legitimately limited by calls of public interest. Only when human rights come into conflict with each other can those rights be limited...Third, it is inalienable [by which it is meant] it is not possible to surrender that right...

Another widely cited definition is that coined by Wasserston. He identifies four requirements if any right is to qualify as a human right:<sup>69</sup>

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<sup>65</sup> A classic treatment of the critique is A Pollis & P Schwab 'Human rights: A western construct with limited applicability' in A Pollis & P Schwab *Human rights: Cultural and ideological perspectives* (New York: Praeger, 1979) p 1 and the collection of essays in that volume.

<sup>66</sup> M Dembour n 50 above at p 59. See also Howard (1990) p 159.

<sup>67</sup> M Cranston *What are human rights*, 2<sup>nd</sup> ed, (New York: Taplinger, 1973) at p 1.

<sup>68</sup> N Ashford *Human rights: What they are and what they are not* (London: Libertarian Alliance, 1995) at p 2.

First it must be possessed by all human beings, as well as only by human beings. Second, because it is the same right that all human beings possess, it must be possessed equally by all human beings. Third, because human rights are possessed by all human beings, we can rule out as possible candidates any of those rights which one might have in virtue of occupying any particular status or relationship such as that of parent, president, or promisee. And fourth, if there are any human rights, they have the additional character of being assertable, in a manner of speaking “against the whole world.”

Pannikar elaborates on these definitions by arguing that the concept of the universality of human rights is based on four connected propositions some of which may have been alluded to in the earlier analysis: firstly, that there is a universal human nature; that this human nature is knowable; and that it is knowable by reason; and finally, that human nature is essentially different from other reality.<sup>70</sup> Thus universalists start with what may seem a very simple and straightforward proposition: human rights belong to individuals by virtue of simply being human. Since humanity or human nature is universal then logically so should human rights.<sup>71</sup> Furthermore, since human beings have human rights simply because they are human, then they hold these rights equally. And again, since being human cannot be renounced, lost, forfeited or impaired, human rights are inalienable.<sup>72</sup>

This conception of human rights finds support in a speech by Fang Lizhi, one of China’s leading dissidents and a key figure in inspiring the Chinese protest movement, delivered in Beijing in 1989, several months before the tragic events that took place in Tiananmen Square. He articulated his position on human rights as follows:<sup>73</sup>

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<sup>69</sup> R Wasserston ‘Rights, human rights and racial discrimination’ (1964) 61 *Journal of Philosophy* p 628.

<sup>70</sup> R Pannikar ‘Is the notion of human rights a western concept?’ (1982) 120 *Diogenes* p 75.

<sup>71</sup> J Donnelly n 52 above at p 18.

<sup>72</sup> As above.

<sup>73</sup> Speech by Lizhi in Beijing on 25 February 1989. Reproduced in G Hicks (ed) *The broken mirror: China after Tiananmen Square* (Chicago: St James Press, 1990) at p xxiii.

As time goes on we are arriving at more and more universally valid concepts, ones that can be applied everywhere...Human rights are such a concept. Human rights are not the property of a particular race or nationality. Every human being has from birth, the right to live, to think, to speak, to find a mate. These are the most fundamental freedoms a human being has. Every person on the surface of the earth should have these rights, regardless of the country he [or she] lives in...The validity of human rights does not depend on the particular culture involved. Cultural biases are fine if you are not asking questions of right or wrong...[for] truth does not distinguish between localities.

Thus, while universalists do not deny that 'cultures are different, they argue that individual sameness or similarity amongst human beings should prevail over cultural difference when it comes to human rights.<sup>74</sup> However, it is this very grounding in human nature that exposes the doctrine of universality to attack. Indeed, Donnelly, himself an ardent proponent of universal human rights concedes that human nature *per se* is to some extent culturally relative.<sup>75</sup> The impact of culture in the shaping of individuals within it is both systematic as well as symptomatic leading to the dominance of distinctive social types in different cultures. A relevant example of this would be the clear and structurally determined differences between the 'natures' of parents and children-both are sets of human beings yet very different.<sup>76</sup> Thus, human nature itself is to a large extent culturally moulded and determined, and hence not universal. Logically then, the claim that it serves as a basis for the universality of human rights must be somehow flawed.

Nonetheless, the main criticism against the universality of human rights is levelled against the origins of the idea itself. Although it is often stated, particularly by western European and North American scholars, that the concept of human rights dates back to

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<sup>74</sup> LS Bell, AJ Nathan & I Peleg 'Introduction: Culture and human rights' in LS Bell, AJ Nathan & I Peleg (eds) *Negotiating culture and human rights* (New York: Columbia University Press, 2001) p 1 at p 5.

<sup>75</sup> J Donnelly n 57 above at p 403.

<sup>76</sup> See B Rwezaura 'Competing "images" of childhood in the social and legal systems of contemporary sub-Saharan Africa' (1998)12 *International Journal of Law, Policy and the Family* p 253 at pp 255-264.

antiquity, in particular to the Stoic philosophers at Athens and Rome, as well as to the medieval tradition of 'natural rights'; the present Western notion of human rights has its roots in eighteenth century West European philosophical theory. The tradition emphasised the individual's rights against the state and the protection of private property as an aspect of individual autonomy.<sup>77</sup> Consequently, those taking a relativist position on the question of human rights reject any assertions of universality as lacking empirical validity, ahistorical and culturally imperialist. They begin by asserting the empirical fact that historically, different societies have had different or no notions of rights. Since the present derivations of human rights came about because as a result of particular social, economic and political circumstances in Europe, it is concluded that individual human rights are not universal but rather, particular western values masquerading as universal concepts.<sup>78</sup>

To counter this charge, universalists argue for the recognition of a single cosmopolitan culture which is alleged to tie all the differing indigenous cultures of the world together. The claim is made that this common culture of modernity has helped effect this unity of all societies through the rise of the globalised economy,<sup>79</sup> and the spread of the nation-state.<sup>80</sup> The argument further claims that all states, regions, cities, villages and families are shaped by this 'new' culture. As the world becomes more and more united in this culture, this is followed by international law and this law takes position as the intercultural legal framework, establishing universal standards-including in the area of human rights. Thus, gradually throughout the globe, individuals have been pulled away from their traditional attachment to the local community and have been absorbed into the emerging culture of modernity sharing universal values and enjoying universal protection.<sup>81</sup>

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<sup>77</sup> VA Leary 'The effect of western perspectives on international human rights' in AA An-Naim & FM Deng (1990) p 15 at pp 17-18.

<sup>78</sup> LS Bell, AJ Nathan & I Peleg n 74 above at p 5.

<sup>79</sup> R Vincent n 53 above at p 50.

<sup>80</sup> M Dembour n 50 above at p 59. See also J Donnelly n 36 above at p 5; B Ibhawoh n 19 above.

<sup>81</sup> R Vincent n 53 above at p 50.

Donnelly shares this argument and states that the modern state, the modern economy and associated 'modern' values tend to create communities of relatively autonomous individuals which lack the place and protection provided by traditional communities and associated structures of society. He, therefore, posits that:<sup>82</sup>

...rights held equally by all against the state, both limiting its legitimate range of actions and requiring positive protections against certain predictable economic, social and political contingencies are a seemingly natural and necessary response to typically modern threats to human dignity, to basic human values, traditional and modern alike.

Relativists dispute this suggestion of 'a culture of modernity' and point out that it has no empirical basis. In fact, they point out that the so-called modernisation is merely a form of westernisation carrying with it a disguised suggestion that a liberal state is the best structure for ordering human relations.<sup>83</sup> If such processes manage to create a culture, then the closest is a dislocated model which has unequal dual economies characterised by very few and very rich individuals and armies of poor citizens living on the margins. Rather than forming a neat unitary 'culture of modernity' with international law and human rights at the helm, these processes only yield as many cultures as there are societies, with modernisation affecting each differently.<sup>84</sup>

To cap their criticisms, relativists accuse universalists of using broad sweeping labels such as 'world social process' or an 'emerging social structure' to disguise their role in instigating westernisation thinly veiled as 'modernisation.'<sup>85</sup> With respect to human rights, it is claimed that innocuous labels such as 'the international laws of human rights' are employed to mask the political agenda of its proponents and to distract people's

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<sup>82</sup> J Donnelly n 57 above at p 414.

<sup>83</sup> Declan O'Sullivan n 38 above p 34.

<sup>84</sup> R Vincent n 53 above at p 50.

<sup>85</sup> As above at p 51.

attention from viewing these documents as merely widening, reinforcing and promoting the legitimacy of western conceptions of what amounts to good society.

In view of the arguments and counterarguments just analysed, Meyer's observation that 'few scholarly topics more readily engender controversies than the question of the universality of human rights norms'<sup>86</sup> aptly describes the debate between universalists and relativists. But more importantly, what the preceding analysis demonstrates is that it is neither possible nor desirable to base a conception of universal rights on solely one or the other of the two philosophical positions. It reveals the critical need for probing enquiries regarding the philosophical and political *raison d'être* of the human rights regime. A truly universal conception of human rights must be able to address the questions raised by both universalists as well as relativists in order to raise the universal legitimacy of human rights norms.

Whereas the bases of human rights norms may be traced to European thinking it is also undeniable that diverse communities across the globe have embraced those ideas. It is also important to accept that the people who have embraced human rights also seek to contribute to them either by seeking to radically reform them or by tinkering at the margins. Ultimately, it must be recognised that the current formulation of human rights cannot in any sense be considered a final truth in the sense of the Mosaic Ten Commandments. Any attempts to portray human rights discourse, particularly of the western kind, as a final truth must, therefore, be rejected. In this regard, O'Sullivan suggests that for an adequate compromise and successful accommodation of the two opposing positions and their approaches to human rights validation, the major issue is to find an agreeable balance between insistence on human rights that everyone ought to enjoy by virtue of their humanity, and the recognition that the existence, content and importance of these rights are contestable and that it is desirable and essential to maintain their continued contestability.<sup>87</sup>

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<sup>86</sup> AE Meyer 'Book review' (1992) 14 *Human Rights Quarterly* p 527.

<sup>87</sup> Declan O'Sullivan n 38 above at pp 38-39.

### 4.3 Mediating between universalism and relativism

Marie-Benedicte Dembour, the feminist legal anthropologist has attempted to mediate between universalists and relativists by pointing out that each of the positions advocated by either side is untenable if considered in isolation of the other.<sup>88</sup> She argues that sole reliance on universalism is likely to breed moral arrogance 'because it excludes the experience of the other.'<sup>89</sup> This, however, does not encourage her to adopt its supposed opposite. In this regard, she notes that strict adherence to relativism may make moral agents indifferent to immoral situations. In her view, culture is not an excuse for abuse. She concedes that this stance against relativism only 'directs us back to the idea that some values must be universal' which position she describes as unsatisfactory. In order to get us out of this conundrum, she suggests that we 'err uncomfortably between the two poles represented by universalism and relativism.'<sup>90</sup> This is so because in the majority of cases, the position will not be so clear cut as to allow us to choose between universalism and relativism.<sup>91</sup> Consequently, she calls for a formulation which does not suggest that the concept of human rights should be displaced 'but to call for a concept that allows local circumstances to be taken into account, *to be part of the equation*.'<sup>92</sup>

Alison Dundes Renteln is another anthropologist who has attempted to proffer a solution to the polarising debate between universalists and relativists by arguing that misconceptions and misinterpretations surround the theory of cultural relativism.<sup>93</sup> She argues that relativism is wrongly associated with tolerance and that 'it is precisely this association which has left cultural relativists in dire straits.'<sup>94</sup> She goes on to note that

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<sup>88</sup> M Dembour n 50 above at p 58.

<sup>89</sup> As above.

<sup>90</sup> As above.

<sup>91</sup> As above at p 59.

<sup>92</sup> As above, emphasis supplied.

<sup>93</sup> See generally AD Renteln 'The unanswered challenge of relativism and the consequences for human rights' (1985) 7 *Human Rights Quarterly* p 514.

<sup>94</sup> See generally Alison D Renteln *International human rights: Universalism versus relativism*, (London: Sage, 1990).

‘there is nothing in the theory of relativism which prevents relativists from criticising activities and beliefs in other cultures.’<sup>95</sup> In her view, the main thrust of the argument ought to be ‘whether or not it is possible to establish cross-cultural universals.’<sup>96</sup> And in her view, even though there may be differences between peoples, there also exist cross-cultural universals ‘held in common by all societies [which might enable one] to validate universal moral standards.’<sup>97</sup> She concludes that just because there are discrete, separate and competing moral systems does not necessarily mean that they do not overlap.<sup>98</sup>

There is, therefore, a critical need to develop and enforce the mutual respect of the opposing ideas and to encourage attempts aimed at establishing an acceptable compromise for the understanding of human rights, their conception, interpretation and implementation. In this regard, John Stuart Mills offers an interesting framework for developing such discourse.<sup>99</sup> He posited that the inherent value in human judgement is that it can be set right when wrong and, obviously, that any position worthy of respect is that which is willingly exposed to both internal and external criticism. What is considered ‘right’ at any given point in time, he argues, is an agreed outcome from the collision of opposing ideas and opinions. To be a full and working assumption then, even when considered wholly true by both sides, the position must still be contested to avoid it evolving as mere prejudice. The standard which subsequently emerges does not allow the imposition by one side of a moral truth, or coercion of others who are not in agreement with it, as Mill believed that coercion has legitimacy for the preservation of ‘self’ and could not be said to exist for the enlightenment of others.<sup>100</sup>

Abdullahi An-Naim’s contributions combine the approaches suggested by Dembour, Renteln and Mills. He fleshes out what he considers to be a cross-cultural approach in the

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<sup>95</sup> As above at p 77.

<sup>96</sup> AD Renteln ‘Relativism and the search for human rights’ (1988) 90 *American Anthropologist* p 56.

<sup>97</sup> Alison D Renteln n 94 above at p 78.

<sup>98</sup> As above at pp 78-79.

<sup>99</sup> JS Mill ‘On liberty’ in M Warnock (ed) *Utilitarianism* (London: Fontana, 1962) p 136.

<sup>100</sup> As above at p 136.



conception and protection of human rights. He explicitly supports the current regime of human rights. His approach 'is based on the belief that despite their apparent peculiarities and diversity, human beings and societies share certain fundamental interests, concerns, qualities, traits and values that can be identified and articulated for a common "culture" of universal human rights.<sup>101</sup> He, however, observes that since people understand things through their own cultural lenses, the legitimacy of human rights standards will only be reached if members of a particular culture believe those standards to be sanctioned by their own culture. In this regard, An-Naim is critical of both the universalist positions based solely on western liberal perspectives and distrustful of militant cultural relativist positions. He argues that it is not impossible, and it is indeed desirable, to maintain a weak form of cultural relativism. A cross-cultural understanding of human rights will involve both internal and external dialogue which may provide a wider, and therefore, more acceptable basis for the universal conception of human rights.

The above analyses demonstrate the discomfort and inappropriateness of basing any universal body of moral principles on solely one tradition or philosophical foundation. The relevance of human rights can only be guaranteed if the concepts that embody it find acceptance across the communities that constitute the human family. It is, therefore, only necessary that human rights workers should strive to formulate and refine a cross-cultural basis and conception of human rights norms. It is evident from the above discussions that no constituency would promote an ethical principle as being inherently right or imperative without genuinely believing it and wishing that everyone else deemed it 'right' and imperative as well. Thus, the debate concerning human rights between cultures is very conscious of an anxiety on all sides to be successful in it. Such a desire is what makes it essential that an acceptable compromise be established because the alternative does not help with establishing a universal basis for the validation of human rights concepts. For an adequate compromise and successful accommodation of the two opposing positions and their approaches to the validation of human rights concepts, the principle task is to formulate an agreeable balance between insistence on the human rights that everyone ought to enjoy, by virtue of their humanity, and the recognition that

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<sup>101</sup> AA An-Naim n 7 above at p 21.

the existence, content and importance of these rights are contestable. It is also important to continually maintain their contestability.

The European Court of Human Rights' doctrine of 'margin of appreciation' provides an example of how local circumstances and local needs, which may correctly be labelled culture, may be worked into human rights discourse. The doctrine is an interpretational tool by which the court delineates between what is properly a matter for each community to decide at the local level and what is so fundamental that the same requirements are imposed on every State, regardless of variations in culture. It is a tool for detecting when the core rights contained in the European Convention on Human Rights ('the European Convention')<sup>102</sup> are violated within the context of a broader diverse system that embraces context and changing needs. In *Otto Preminger Institute v Austria*<sup>103</sup>, the court was called on to decide whether a decision of Austrian authorities in Tyrol to destroy a film, which had offended Christian feelings, had violated the right to freedom of expression. In upholding the decision and ruling that there had been no violation of the European Convention, the Court held:<sup>104</sup>

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<sup>102</sup> European Convention on Human Rights, adopted by the Council of Europe on 4 November 1950 (entered into force on 3 September 1953) (ETS 5), 213 U.N.T.S. 222, as amended by Protocols Nos 3, 5, and 8 which entered into force on 21 September 1970, 20 December 1971 and 1 January 1990 respectively.

<sup>103</sup> Judgement of 20 September 1994, Series A, No. 295-A; (1995) 19 *European Human Rights Reports* 34.

<sup>104</sup> As above at para 56. See also *Ireland v UK*, 2 EHRR 25 (1978) at 91–92; *James v UK*, 8 EHRR 1123 (1986), at 1142–143 holding that: '[T]he Court cannot substitute its own assessment for that of the national authorities'; *Karatas v Turkey* [1999] IV ECtHR 81, at 120 (Joint Partly Dissenting Opinion of Judges Wildhaber, Pastor Ridruejo, Costa and Baka) opining that: 'In the assessment of whether restrictive measures are necessary in a democratic society, due deference will be accorded to the State's margin of appreciation; the democratic legitimacy of measures taken by democratically elected governments commands a degree of judicial self-restraint'. The judicial restraint doctrine has also been applied by other international tribunals. See, for example, *EC – Measures Concerning Meat and Meat Products*, WTO WT/DS26/AB/R (1998) at para. 117 ('the applicable standard is neither *de novo* review as such, nor "total deference", but rather the "objective assessment of the facts"'); *Argentina – Safeguard Measure on Imports of Footwear*

The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. It is in the first place for the national authorities, who are better placed than the international judge, to assess the need for such a *measure in the light of the situation obtaining locally at a given time*. In all the circumstances of the present case, the Court does not consider that the Austrian authorities can be regarded as having overstepped their margin of appreciation in this respect. (Emphasis added).

The application of this doctrine demonstrates the possibility of including local concerns within formal human rights frameworks. Such an approach does not take away the effectiveness of human rights mechanisms but rather endows it with legitimacy by ensuring that local concerns are not trampled under the guise of international human rights law.

## **5 The implications of the debate for the protection and promotion of children's rights in Africa**

The present international legal framework for children's rights also suffers from an adverse identification with western liberal notions of individualism. Thus, despite the proclaimed procedural universality of the Convention on the Rights of the Child ('the Convention' or 'the CRC')<sup>105</sup>, the instrument is viewed in some quarters as perpetuating the domination of western legal philosophy in the articulation of human rights standards.

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(Footwear), WTO Doc. WT/DS121/AB/R (2000), at para. 121; *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001), at para. 168.

<sup>105</sup> Convention on the Rights of the Child, adopted 20 November 1989 (entered into force 2 September 1990) GA Res. 44/25 (1989), UN Doc. A/RES/44/25 (1989). Text also available in 28 *International Legal Materials* (1989) 1448 and 29 *International Legal Materials* (1990) 1340. See G Van Bueren, G 'Children's rights: Balancing traditional values and cultural plurality' in G Douglas & L Sebba (eds) *Children's rights and traditional values* (Aldershot: Dartmouth, 1998) p 15.

Okupa is one such critic who holds this view. She puts forward her argument in the following terms:<sup>106</sup>

[T]he universality of the Convention merely reflects the ethical views of the dominant group imposed on the rest to create child law principles of dominant states, [and] ultimately to form a pretentious imperialism of homogenous child culture for the children of the world.

To some extent, such criticism is warranted for most of the provisions appearing in the CRC seem to have a precedent in western law and philosophy. Consequently most of the criticisms that are raised and applied to the international human rights corpus would apply to this category of human rights. For example, the best interests principle which '[t]he Committee on the Rights of the Child has not hesitated to declare...the guiding principle of the Convention on the Rights of the Child' is a creature of western law.<sup>107</sup> It is quite telling to note that there are no similar principles with such an 'umbrella' nature borrowed from other legal traditions.

Furthermore, the CRC's emphasis on equality and non-discrimination and the sanctity of privacy, particularly in articles 2 and 16 reflect an inherently western and individualistic view of children, state and society whereby autonomous individuals are regarded as possessing basic equality. However, such basic equality is likely to be perceived as an incoherent and incomprehensible concept where children are defined by socially ascribed characters befitting their age, gender or sex.

The same observations may be made with respect to the child's right to privacy, freedom of speech, thought or conscience and religion which are very contentious in societies that

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<sup>106</sup> E Okupa *Ethno-jurisprudence of children's rights: A study of the Himba of Namibia* (PhD thesis, University of London, 1996) p 299.

<sup>107</sup> P Alston & B Gilmour-Walsh *The best interests of the child: Towards a synthesis of children's rights and cultural values* (Innocenti Studies, UNICEF International Child Development Centre, 1996) p 1.

are characterised by strongly entrenched communal values and which have led to some states entering reservations to these provisions.<sup>108</sup>

With regard to the role of culture in the protection of children's rights, the CRC is remarkably terse. With the exception of the preambular paragraph 'taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child';<sup>109</sup> article 5's reference to 'the extended family or community as provided for by local custom' and article 20's reference to *kafalah*; there is little express reference to culture as a positive value in the Convention. This discomfort with culture as a positive value perhaps is a poignant reminder that culture and human rights are often conceptualised as antagonistic entities.<sup>110</sup>

With regard to the African contribution, the criticisms go towards not only to the final form that the CRC took but also to the process from which the CRC itself resulted. In this regard, it is pointed out that African states played a minimal role in the drafting process. Table 1 shows the numbers of states that participated in the Working Group on the Draft Convention on the Rights of the Child. Although 11 seats had been allocated to African states, a very tiny proportion of this potential actually took part during the drafting process.

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<sup>108</sup> See generally William Schabas 'Reservations to the Convention on the Rights of the Child' 1996 18 *Human Rights Quarterly* pp 472 – 491. See also <<http://www.hri.ca/fortherecord1997/documentation/reservations/crc.htm>> (accessed 22 December 2006).

<sup>109</sup> CRC, preamble para 12.

<sup>110</sup> K Hastrup 'Accommodating diversity in a global culture of rights: An introduction' in K Hastrup (ed) *Legal culture and human rights: The challenge of diversity* (The Hague: Kluwer Law International, 2001) p 1.

**Table 1: The number of states participating in the drafting process of the CRC<sup>111</sup>**

Caucus	1981	1982	1983	1984	1985	1986	1987	1988	Second reading
Western Europe	14	13	15	16	18	16	17	17	17
Eastern Europe	5	6	4	6	6	5	5	6	6
Asia	3	4	6	6	7	7	9	10	15
Africa	3	1	3	1	7	4	3	7	9
Latin America	2	4	7	5	9	6	6	7	8
Total	27	28	35	34	47	38	40	47	57

However, despite this background, it does not mean that there are no cross-cultural equivalents within African societies for the protection of children’s rights. In fact, the absence of significant objections to the standards adopted by the participating African countries, few as they were,<sup>112</sup> may actually be indicative of consensus that the articulated norms reflected values respecting the rights and welfare of the child. This observation bears some weight when one considers that despite the not-so-significant played by African states in the ten years of discussion preceding the Convention’s adoption; it was quickly ratified by a significant proportion of states on the Continent. After about two years of coming into force, the Convention had been ratified 39 out of a possible 52 states in Africa representing a 75% ratification rate. It is perhaps telling evidence of Africa’s enthusiasm for the cause of the rights and welfare of the child that Ghana holds the title of being the first country in the world to ratify the CRC.

If the debate regarding the implementation of the rights and welfare of the child in Africa was to follow the same trajectory that the debate regarding international human rights has taken, then it would simply become a polarised debate where each side is not able to concede to the other and the only way to sustain the arguments is to highlight weaknesses in opposing theories. However, this type of discourse, interesting as it may be, merely

<sup>111</sup> Information collated from the reports of the Working Group

<sup>112</sup> For example, Senegal objected to the singling out of female genital cutting under article 23(4) of the CRC which deals with harmful cultural practices.

serves to delay reconciliation between the universal standards of children's rights and considerations of local values. By positing these two paradigms as complimentary, the African Children's Charter has moved the debate towards seeking practical solutions aimed at resolving the questions raised by both universalists and relativists.

In this regard, the Charter presents a cultural-universalist outlook that is not only represented in the philosophical basis of the document but also straddles its substantive as well as procedural elements. Thus, whilst pointing to and drawing inspiration from the virtues of African cultural heritage, historical background and the values of African civilisation, the African Children's Charter affirms poignantly the African states' adherence to the principles enunciated by the Convention on the Rights of the Child.<sup>113</sup> Additionally, the interpretive provisions of the Charter call for inspiration to be drawn from 'international law on human rights'.<sup>114</sup> The unequivocal recognition of existing international children's rights standards cannot be regarded as mere political window dressing by African states but is in fact indicative of a commitment to the realisation of international children's rights norms within the African cultural space. The African Children's Charter eloquently serves to confirm the universality and topicality of the Convention on the Rights of the Child to the children of the African continent but with due emphasis on their particular political, economic, social and cultural situation.<sup>115</sup> The African Children's Charter is, therefore, without doubt the perfect place to look for anyone desirous of ascertaining how African sovereign states have endeavoured to reconcile their cultural diversity with the universality of children's rights. If there is an African conception of children's rights, it is logically to the text of the African Children's Charter that one should look for its precise contours and demarcations.

With regard to the substantive constitution of the Charter, even the most inattentive reader will notice the great similarities between the conception of the rights laid down by the CRC and other international instruments relating to the rights and welfare of the

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<sup>113</sup> African Children's Charter, preamble para 8.

<sup>114</sup> African Children's Charter, art 56.

<sup>115</sup> African Children's Charter, preamble para 3.

child. There is nothing remarkable about this because the African Children's Charter itself recognises the paramountcy of human rights<sup>116</sup> and its progenitor, the African Charter on Human and Peoples' Rights,<sup>117</sup> states that 'fundamental human rights stem from the attributes of human beings.'<sup>118</sup> Consequently, the core of the African Children's Charter's substantive norms could not be 'original' in any clean slate sense. However, what is original is the cultural-universalist formulation of the African Children's Charter norms which highlights a certain universality of the aspirations of African children, their expectations and, therefore, their rights. Moreover, the express reference by the African Children Charter to the CRC confirms the recognition of this universality by African states<sup>119</sup> who at the same time sought to ground the recognition and application of norms relating to the rights and welfare of the child in the virtues of African cultural heritage and the values of African civilisation. It is, therefore, not a philosophy of difference or other-ness that underlies the African Children's Charter but rather the need for complementarity and contextualisation. It is with these objectives in mind that the authors of the African Children's Charter sought to make it an instrument both in keeping with African traditions and values and well-suited to its unique social, economic, political and cultural environment whilst at the same time maintaining its universalist outlook.

A similar posture is also reflected in the African Children's Charter's procedural and implementation framework. In this regard, the African Committee of Experts on the Rights and Welfare of the Child which is mandated with the consideration of state reports and the handling of communications amongst other implementation activities<sup>120</sup> is called

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<sup>116</sup> African Children's Charter, preamble para 1.

<sup>117</sup> African Charter on Human and Peoples' Rights, adopted June 27, 1981 (entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>118</sup> African Charter, preamble para 5.

<sup>119</sup> The principle of the universality of human rights was recognised by African states at the OAU's First Ministerial Conference on Human Rights in Africa, Grand Bay, Mauritius, 12-16 April 1999. See Declaration and Plan of Action adopted on that occasion which states in para 1 that 'human rights are universal.' Document available at <<http://www.africanreview.org/docs/rights/grandbBay.pdf>> (accessed on 22 December 2006).

<sup>120</sup> African Children's Charter, arts 52 & 53.



upon to draw inspiration not only from African values and traditions but also from the international law on human rights and in particular from the UDHR, the CRC and other human rights instruments adopted by the United Nations.<sup>121</sup>

It is, therefore, clear from the foregoing that the authors of the African Children's Charter sought to anchor it in the cultural and social reality of the continent without at the same time merely paying lip service to international standards. Insistence on the recognition of the 'cultural heritage' and 'historical background' of African civilisation does not in any way suggest that the African Children's Charter is in some respects archaic or backward-looking. By elevating the virtues and values of African civilisation, the authors of the African Children's Charter were not pandering to cultural-relativist ideas regarding the place of children's rights conceptions but instead succeeded in producing a document which is very unique and original. Its outlook certainly reflects the lived reality of African children as will be seen when considering the results of interviews conducted during the fieldwork that complements this study.

Thus, the African Children's Charter is a document very rich in potential and should contribute tremendously in securing African children their rights and welfare. Its provisions are relevant and adaptable and should help provide a culturally legitimate framework which is inspired by international norms yet firmly grounded to the local context.

Having discussed the African Children's Charter's position within the general discourse on human rights, the thesis will now shift its focus towards the substance of the Charter itself. Consequently, the next chapter focuses on the beneficiaries of the Charter's protections through an analysis of the related concepts of children's rights and childhood.

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<sup>121</sup> African Children's Charter, art 46.

## Chapter 5

### Childhood and children's rights: Focusing on the beneficiaries of the African Children's Charter

#### 1 Introduction

The provisions of the African Charter on the Rights and Welfare of the Child ('the African Children's Charter' or 'the Charter')<sup>1</sup> apply to all human beings below the age of 18 years.<sup>2</sup> However, the manner in which the rights and welfare of the child are protected is ultimately determined by societal notions of rights as well as how childhood is perceived. Consequently, in order to institute legal frameworks that are effective in securing the human rights of children, it is critical to understand the ideologies, symbols and meanings that lie behind notions of children's rights and childhood. In light of this observation, this chapter analyses how concepts of children's rights and childhood have influenced the character and content of the African Children's Charter. This is in view of the fact that no assessment of the rights and welfare of the child would quite be complete without an assessment of the philosophical and jurisprudential analyses of the correlated concepts of children's rights and childhood.

The chapter is divided into five parts, the first one of which is this introduction. The second part is a brief foray into the analytical and jurisprudential debates regarding the nature of children's rights and how these debates affect the character and effectiveness of the African Children's Charter. In the third part, I analyse the related concept of childhood and how it is constructed for different purposes and contexts. In the fourth part, I consider the relationship between children's rights and childhood and analyse how concepts of childhood ultimately influence the nature and character of children's rights prescriptions. The final part outlines some concluding remarks.

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<sup>1</sup> African Charter on the Rights and Welfare of the Child, adopted July 1990 (entered into force 29 November 1999) OAU Doc.CAB/LEG/24.9/49 (1990).

<sup>2</sup> African Children's Charter, art 2.

## 2 The rights and welfare of the child

Concepts regarding the rights and welfare of the child are both ambiguous and highly contested. It is particularly common to find in the literature questions asked such as ‘what do rights for children mean?’ or ‘who is responsible for asserting the rights of children?’. Asking these questions about this category of rights and attempting to find answers to them is not idle pursuit. It is important to constantly critique and cross-examine our understanding of what children’s rights are and are not in order to appreciate fully the extent of the political, social and cultural significance of their application in varying contexts. In this regard, Jane Fortin, an eloquent spokesperson of the children’s rights movement observes that:<sup>3</sup>

The ideas of theorists can obviously be of more practical assistance if translated into a set of legal principles which provide clear guidance over the extent to which children’s rights can be fulfilled [and]...should not be dismissed as having little practical impact. They may provide a sound intellectual basis for preferring one course of action to another. Despite the fact that this body of intellectual thought has not taken particular account of the needs of practitioners, it does provide a far better basis for translating the concept of children’s rights into practice rather than mere intuition or prejudice.

As was noted in the introductory chapter of this thesis, the virtually universal ratification of the Convention on the Rights of the Child (‘the Convention’ or ‘the CRC’)<sup>4</sup> has been hailed as a major step forward for the protection of international human rights. This universal ratification has been treated by children’s rights advocates as evincing the obvious nature of the benefits of the Convention.<sup>5</sup> In this regard, Vanessa Pupavac notes that ‘universal concern for children is viewed as

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<sup>3</sup> J Fortin *Children’s rights and the developing law* (London: Butterworths, Lexis-Nexis, 2003) at p 27.

<sup>4</sup> Convention on the Rights of the Child, adopted 20 November 1989 (entered into force 2 September 1990) GA Res. 44/25 (1989), UN Doc. A/RES/44/25 (1989). Text also available in 28 *International Legal Materials* (1989) 1448 and 29 *International Legal Materials* (1990) 1340.

<sup>5</sup> V Pupavac ‘Misanthropy without borders: The international children’s rights regime’ (2001) 25 *Disasters* p 95 at pp 95-6. Extrapolating this argument, children’s rights advocates assert that if the rights and welfare of the child are so ill-conceived, why would so many states ratify them.

transcending political and social divides and able to mobilise societies to confront social problems and prevent war...and because of this virtually universal ratification, the benefits of the Convention are treated as axiomatic.’<sup>6</sup> Consequently, analyses relating to the rights and welfare of the child often follow a bland pattern that focuses on the unacceptable differences between the legal framework for children’s rights and the practice of children’s rights.

Children’s rights advocates see a granting of this category of rights as ‘a natural progression from previous civil rights struggles, which recognised the equal rights of slaves, workingmen and women, blacks and other groups.’<sup>7</sup> However, the institutionalisation of children’s rights has more profound implications than orthodox literature would seem to suggest. In this regard, a considerable number of children’s rights advocates seem to disregard the advice offered by the Slovenian philosopher Slavoj Žižek that ‘each of these supplementary gestures does not simply apply the notion of human to ever new domains...but retrospectively redefines the very notion of human rights.’<sup>8</sup> Indeed a critical examination of the concept of children’s rights and its implications reveals a deep theoretical misalignment between the traditional understanding of rights and the contemporary rendering of children’s rights.

Conferring rights on children is viewed as recognising their moral equality with adults, thereby underscoring the moral worth of all human beings, irrespective of their situation. However, in contrast to the traditional understanding of rights, human rights are based on the inherent moral personality of humans. This inclusive basis of human rights as membership of the human family is evident in the preamble to the CRC which adverts to the ‘inherent dignity and of the equal inalienable members of the human family.’<sup>9</sup> The institutionalisation of human rights including children’s rights in international law represents a great shift from the traditional conceptions of ‘rights’ under classical law. Within the latter paradigm, possession of rights is predicated upon the individual’s capacity for self determination, that is the ability to choose to exercise or waive the right or rights in question. Thus, according to this philosophy on

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<sup>6</sup> As above p 95.

<sup>7</sup> As above p 96.

<sup>8</sup> S Žižek *The ticklish subject: The centre of political ontology* (London: Verso, 1999) at p 180.

<sup>9</sup> CRC, Preamble, para 1.

the nature of rights, the extension of rights to different groups in society such as women and minorities was effectively *de jure* recognition of their *de facto* capacity to exercise rights. However, critics who have ventured beyond describing human rights as ‘nonsense upon stilts,’<sup>10</sup> have pointed out that making capacity a prerequisite for the exercise of human rights only results in effectively excluding the very groups whom human rights were supposed to protect such as women and children. Elaborating this perspective in relation to children’s rights, Kate Federle makes the following observation:<sup>11</sup>

Having a right means having power to command respect, to make claims and to have them heard. But if having a right is contingent upon some characteristic, like capacity, then holding that right becomes exclusive and exclusionary; thus only claims made by a particular group of (competent) beings will be recognised...Children, however, have been unable to redefine themselves as competent beings; thus powerful elites decide which, if any, of the claims made by children they will recognise.

This tension has been a constant undercurrent ever since the beginning of efforts to bring forth an international code of children’s rights. In this regard, Michael Freeman, has noted that children were not even consulted by international policy makers who drafted the CRC.<sup>12</sup> Franz Viljoen makes similar observations regarding the process which bore the African Children’s Charter.<sup>13</sup> This absence of consultation is not merely accidental but goes to the very heart of adults’ views regarding childhood. In other words, how are we at the same time to treat children as capable of exercising

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<sup>10</sup> Jeremy Bentham famously stated: ‘Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense -- nonsense upon stilts.’ J Bentham ‘Anarchical fallacies’ in J Bowring (ed) *The works of Jeremy Bentham* (Edinburgh: Tait, 1838-1843) vol 2. See also P Schofield, C Pease-Watkin & C Blamires (eds) *Rights, representation, and reform - Nonsense upon stilts and other writings on the French Revolution* eds. (Oxford: Clarendon Press, 2002) p 330

<sup>11</sup> K Federle ‘Rights flow downhill’ (1994) *International Journal of Children’s Rights* p 343 at p 343-4.

<sup>12</sup> M Freeman & P Veerman *The moral status of children: Essays on the rights of the child* (Dordrecht: Martinus Nijhoff, 1997) at p 26.

<sup>13</sup> F Viljoen ‘The African Charter on the Rights and Welfare of the Child’ in CJ Davel (ed) *Introduction to child law in South Africa* (Landsdowne: Juta, 2000) p 214

rights whilst also emphasising how much they need our protection? The readings on this subject suggest that it is no easy matter to find a single body of theory that is comprehensive enough to integrate with any coherence children's demands for autonomy with the realities of their dependence and vulnerability.<sup>14</sup>

The fundamental conceptual problem with children's rights discourse arises from the separation of the rights holder from the moral agent, that is the person or institution empowered to act by the institutionalisation of children's rights. Thus, Pupavac observes that although children are deemed as rights holders under both the African Children's Charter and the CRC, the child is not regarded as the moral agent who determines those rights.<sup>15</sup> In other words, the main doubt over whether children do possess rights stems from the absence of capacity to exercise choice with respect to the enjoyment of the rights.<sup>16</sup> In this regard, it is contended that a person may not be properly regarded as a rights-holder unless they are able to exercise a choice over the exercise of that right. Since the existence of a right is therefore dependent on the rights-holder's ability to choose and since the majority of children lack the competence (whether institutional or real) to make the choices, the proponents of this view argue that they cannot be properly described as being rights-holders.<sup>17</sup> This discomfort with the separation between the rights-holder and the moral agent is also apparent in the provisions of the CRC and the African Children's Charter. Thus, although the child is given the right to express his or her views;<sup>18</sup> it is not the child's views but rather the child's 'best interests' that are the paramount consideration.<sup>19</sup> In

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<sup>14</sup> D Nelken 'Afterword: Choosing rights for children' in G Douglas & L Sebba (ed) *Children's rights and traditional values* (Aldershot: Ashgate Dartmouth, 1998) p 315.

<sup>15</sup> V Pupavac n 5 above at p 99.

<sup>16</sup> J Fortin n 3 above ch. 1, esp pp 13-27 where she proffers an insightful analysis on the interface between children's rights, autonomy and paternalism.

<sup>17</sup> See HLA Hart 'Are there any natural rights?' reproduced in J Waldron *Theories of rights* (Oxford: Oxford University Press, 1984) p 82 who considers, on the basis of this analysis that the term 'rights' is inappropriate for application to babies or indeed to animals.

<sup>18</sup> African Children's Charter, art 7; CRC, art 12.

<sup>19</sup> See African Children's Charter, art 4(1); CRC, art 3(1). See J Eekelaar 'The importance of thinking that children have rights' (1992) 6 *International Journal of Law and the Family* p 221 at pp 228-230. See also *Re W(a minor) (medical treatment)* [1993] Fam 64; and *Re E (a*

most cases what is in the child's best interests will not be decided by the child herself but rather by others who are 'better placed' to make that decision. This position must be contrasted with the exercise of human rights by adults whereby the concerned individual's views are the paramount consideration.

However, the suggestion that children who are too young and incompetent to claim their rights, therefore, have no rights, has an 'unattractive logic'.<sup>20</sup> It goes against the intuitive view that children must have rights because it would be wrong to deny them entitlement to such privileges.<sup>21</sup> In contradistinction to theorists who emphasise the choice-or capacity-based theories of rights, legal philosophers such as Raz, O'Neill and MacCormick argue that the concept of rights and the demarcation of rights-holders need not and should not be restricted to those who can lay claim to or waive them.<sup>22</sup> They argue that a person has rights where his or her interests are protected in certain ways by the imposition of normative constraints on the acts and activities of other people with respect to the subject matter constituting the interest.<sup>23</sup> In line with this thesis, it is submitted that children, just like adults have interests which require protecting so that denying them the moral and legal rights until they have acquired the capacity to reach reasoned decisions is philosophically unsound.<sup>24</sup> Thus despite the lack of capacity attributed to adults (sometimes erroneously), children's interests are no less important than those of adults. In the words of MacCormick:<sup>25</sup>

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*minor*) (wardship: medical treatment) [1993] 1 FLR 386 where courts overrode the views of children in order to secure their best interests.

<sup>20</sup> J Fortin n 3 above at p 13.

<sup>21</sup> As above.

<sup>22</sup> See generally, J Raz *The morality of freedom* (London: Clarendon Press, 1986) esp pp 165-92; O O'Neill 'Children's rights and children's lives' (1988) 98 *Ethics* p 445 at p 485; N MacCormick 'Children's rights: A test case for theories of rights' in DN MacCormick (ed) *Legal rights and social democracy: Essays in legal and political philosophy* (London: Clarendon Press, 1982) p 152 at p 154.

<sup>23</sup> N MacCormick, as above at p 152.

<sup>24</sup> J Fortin n 3 above at p 14; T Campbell 'The rights of a minor' in P Alston, S Parker & J Seymour (eds) *Children, rights and the law* (London: Clarendon Press, 1992) p 5.

<sup>25</sup> N MacCormick n 22 above at p 160.

To argue, on the other hand, that each and every child is a being whose needs and capacities command our respect, so that denial to any child of the wherewithal to meet his or her needs and to develop his or her capacities would be wrong in itself (at least in so far as it is physically possible to provide the wherewithal) and would be wrong regardless of the ulterior disadvantages and advantages to anyone else-so to argue, would be to put a case which is intelligible as justification of the opinion that children have such rights.

It is tempting to overlay this deficiency of children's rights and propose radical changes or consign the whole idea of children's rights to the dustbin. However, claims to 'rebuild the temple' in three days have previously been met with hostility and have resulted in death penalties being levied. Consequently, this thesis does not adopt a nihilistic posturing but rather recognises the existence and attraction of children's rights.

A good number of people will have an idea about what is being talked about if children's rights are in issue. In addition more and more people are invoking children's rights in the face of adversities that beset children. It would, therefore, be wishful thinking to imagine that the children's rights corpus as it is currently constituted will somehow go away because of problems with its conceptualisation. In this regard, it should be noted that despite the multi-faceted, unwieldy and even contradictory nature of much 'rights talk' the idea that children do and should have rights has made considerable progress, and has become central to one of the most successful human rights campaigns the human race has ever seen. The African Children's Charter is without doubt a part of this movement. The instrument seeks to provide the legal basis for ensuring that the dignity of all African children is protected and that it is so protected not only in hortatory language (as was the case with the African Children's Declaration) but rather that it does so in binding legal language. As with all attempts to promote and protect human rights, one must start somewhere. Viewed from this perspective, the African Children's Charter has the qualities of a good starting point backed as it is by a venerable pedigree of human rights documents and international practice that give solid testament to the recognition that protecting the dignity of children is not inconsequential.

Apart from placing the African Children's Charter within international children's rights discourse, the theoretical justifications for children's rights outlined above also



provide useful material for the advocates of human children's rights to build a case for their recognition and protection within diverse African communities. However, it must also be acknowledged that children's rights as currently constituted at international law are a comparatively recent idea and their acceptability requires major shifts in how societies consider the socio-temporal location known as childhood. In the following sections, I briefly consider the concept of childhood and its various permutations. More importantly, I analyse how changes to how childhood is perceived influences the nature and scope of entitlements that society is able to afford to children. This latter aspect is very crucial because it determines the extent to which documents such as the African Children's Charter can be deployed as effective tools for the promotion and protection of children's rights.

### 3 The concept of childhood

We all imagine we know what childhood is and who children are. After all, we can easily recognise 'a child and know well enough who amongst us are children.'<sup>26</sup> In basic terms, childhood may be seen as the biological or psychological phase of life somewhere between infancy and adulthood.<sup>27</sup> However, childhood is not that simple or basic. Van Bueren correctly describes it as a very complex social construct and suggests that any attempt to define and demarcate it is inevitably artificial.<sup>28</sup> It may be viewed as a social institution: an actively negotiated set of social relationships within which the early years of human life are constituted. Whilst the immaturity of children is a biological fact of life, the ways in which this immaturity is understood, contextualised and made meaningful is a fact of culture.<sup>29</sup> Thus, Neill Postman

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<sup>26</sup> A James & AL James *Constructing childhood: Theory, policy and social practice* (Hampshire: Palgrave Macmillan, 2004) p 14.

<sup>27</sup> J Fionda 'Introduction' in J Fionda (ed) *Legal concepts of childhood*, Oxford: Hart Publishing, 2001) p 1 at p 3.

<sup>28</sup> G van Bueren *International law on the rights of the child* (Amsterdam: Kluwer Law Publishing, 1995) p 32.

<sup>29</sup> See generally, JS Lafontane *Sex and age as principles of differentiation* (London: Academic Press, 1979).

distinguishes between the biological and the social aspects of childhood. He couches his analysis in the following manner:<sup>30</sup>

Children are the messages we send to a time we will not see. From a biological point of view, it is inconceivable that any culture will forget that it needs to reproduce itself. But is quite possible for a culture to exist without a social idea of children. Unlike infancy, childhood is a social artefact, not a biological category. Our genes contain no clear instructions about who is and is not a child and the laws of survival do not require that a distinction be made between the world of adult and the world of a child.

Ultimately, conceptions of childhood are but characterisations artificially constructed by the adult world to define and analyse a supposedly discrete social group.<sup>31</sup> Thus, although in many theoretical approaches to child and childhood studies there is emphasis on the need to consult children and to take their views into account,<sup>32</sup> few studies have in fact paid children the respect they deserve by working directly and consistently with them.<sup>33</sup> In this regard, Stuart Aitken insists that:<sup>34</sup>

[C]hildhood as it is currently constituted is a construct within which the otherness and peculiarity of children are rendered safe and manageable for programmatic research...

Thus, although the term 'childhood' suggests a strong association with children, childhood itself has always been dominated by adults. Consequently, children, their lives, hopes and aspirations have often been rendered invisible because these aspects of their lives have been overlaid with adults' visions of their proper place in society.<sup>35</sup>

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<sup>30</sup> N Postman *The disappearance of childhood* (London: Vintage, 1994) p xi.

<sup>31</sup> J Fionda n 27 above at p 3.

<sup>32</sup> Under the CRC and the African Children's Charter, this proposition is a right. See CRC arts. 12 & 13 and African Children's Charter, arts. 4(2) & 7.

<sup>33</sup> P Henderson *Annotated bibliography on childhood with emphasis on Africa: Outline, general findings and research recommendation* (Dakar: CODESRIA, 2003) at p 2.

<sup>34</sup> SC Aitken 'Global crises of childhood: rights, justice and the unchildlike child' (2001) 33 *Area*.

<sup>35</sup> P Henderson n 33 above at p 2.

Studies into social reform and child welfare in the twentieth century have identified the scale and purposes of intervention into childhood.<sup>36</sup> Hordes of social workers, health professionals and child lawyers spend their working lives attempting to modify childhood; inventing many novel ways to make it better. Specialists' concepts, assumptions, prejudices and perceptions serve to justify interventions which range from judicial sanction, health promotion to parenting classes. Commenting on this phenomenon, Berry Mayall has commented that the need to monitor and safeguard childhood has 'led to unprecedented surveillance of children-both at school and at home.'<sup>37</sup> Consequently, the political space known as childhood is occupied, governed and controlled by adults who decide its character, constitution and boundaries.<sup>38</sup> In a work that attempts to chart the bases and proliferation of political strategies in late modernity designed to govern the individual through the capture of the inside rather than the constraint of the outside, Nikolas Rose eloquently traces the dramatic increase in agencies and ideologies that claim estate over the child. According to him:<sup>39</sup>

Childhood is the most intensively governed sector of personal existence. In different systems, at different times, and by many different routes varying from one section of society to another, the health, welfare and rearing of children have been linked in thought and practice to the destiny of the nation and the responsibilities of the state. The modern child has become the focus of innumerable processes that purport to safeguard it from physical and moral danger, to ensure its 'normal' development, to actively promote certain capacities and attributes such as intelligence, educability and emotional stability.

The artificiality of the concept of childhood is demonstrated not only by the domination of adults within the terrain of childhood but also by the existence of a multiplicity of theses and perspectives regarding the concept. Explanatory and theoretical models of childhood depict fluctuating and fluid perspectives depending

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<sup>36</sup> See, for example, H Hendrick *Child welfare: England 1872-1989* (London: Routledge, 1994).

<sup>37</sup> B Mayall 'The sociology of childhood in relation to children's rights' (2001) 8 *International Journal of Children's Rights* p 243 at p 244.

<sup>38</sup> As above at p 245.

<sup>39</sup> N Rose *Governing the soul: The shaping of the private self* (London: Routledge, 1989) at p 121.

on the particular social or academic discipline that influence or inform them. Consequently, constructions of childhood both within and between disciplines such as history, sociology, philosophy or law often propose dichotomous or even contradictory perception of what the concept entails.<sup>40</sup>

For example, Chris Jenkins analysis on the sociological perspective of childhood offers a very good example of the complexity involved in theoretical constructions of childhood. His scheme identifies two principal categories, namely, the pre-sociological child and the sociological child.<sup>41</sup> He describes the pre-sociological child as containing the 'dustbin of history', the realm of common sense, classical philosophy, developmental psychology as well as the pervasive field of psychoanalysis. What distinguishes this particular category is that its proponents:

begin from a view of childhood outside of or uninformed by the social context within which the child resides. More specifically, [the] models are unimpressed by any concept of social structure.<sup>42</sup>

In contrast, the sociological child is a product of social processes. Central to these processes is the concept of socialisation which has been employed by many a sociologist to delineate the medium through which children learn to conform to social norms.<sup>43</sup> Socialisation involves the transmission of culture from one generation to another. Commenting about this process, Ritchie and Kollar observe that:<sup>44</sup>

The central concept in the sociological approach to childhood is socialisation. A synonym for this process may well be acculturation because this term implies that children acquire the culture of human groupings in which they find themselves. Children are not to be viewed as individuals fully equipped to participate in a

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<sup>40</sup> J Fionda n 27 above at pp 4 & 5.

<sup>41</sup> C Jenkins ' Sociological perspectives and media representations of childhood' in J Fionda (ed) *Legal concepts of childhood*, Oxford: Hart Publishing, 2001) p 20.

<sup>42</sup> As above at p 23.

<sup>43</sup> See generally F Elkin & G Handel *The child and society: The process of socialization*, 2nd ed, (New York: Random House, 1972); K Danziger *Socialization*, (London: Penguin, 1971.

<sup>44</sup> O Ritchie & M Kollar *The sociology of childhood* (New York, Appleton County Crofts, 1964) at p 117.

complex adult world, but as beings who have the potential for being slowly brought into contact with human beings.

However, whereas there is agreement regarding the centrality of socialisation in the process of childhood, the same is not the case with regard to the sociological perspectives of the concept. Thus, for example, Jenkins identifies four categories of perspectives concerning the sociological child.<sup>45</sup> These include the socially developing child, the socially constructed child, the tribal child and the social structural child. What is common amongst all these models is not just the centrality of the concept of socialisation but also the fact that they are models drawn up by adults to describe childhood. Indeed, rare would be the occasion that a child would describe himself or herself as a social structural child.

Further imprecision also comes from the existence both in law and in common usage of concepts which overlap with or share aspects of childhood.<sup>46</sup> These concepts include terms like infant, baby, juvenile, adolescent, youth, young person and minors. As Geraldine Van Bueren aptly notes, 'the usage of these terms is often characterised by the absence of consistency and precision precisely because the terms themselves are not defined satisfactorily.'<sup>47</sup> The English language is not alone in having a multiplicity of terms that describe childhood or some part of it. In Malawi, the Chichewa vernacular equivalent of 'child' does not do away with ambiguities regarding who a child is. Thus, the word *mwana* does not of itself distinguish the beginning or the end of childhood and neither does it quantify an individual's age. In order to reduce these ambiguities, the word is used with descriptive qualifiers to ascertain the nature, state, or aspect of childhood. Adopting the distinction suggested by Neill Postman between the biological and social aspects of childhood,<sup>48</sup> the tables below demonstrate the different usages and role of language in conceptualising childhood amongst Lomwe people of Malawi as well as amongst other Malawian groups that have adopted *Chichewa* as their common language.

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<sup>45</sup> C Jenkins n 41 above at pp 33-42.

<sup>46</sup> G Van Bueren n 28 above at p 32.

<sup>47</sup> As above at p 32.

<sup>48</sup> N Postman n 30 above p xi.

**Table 2: The biological development of children<sup>49</sup>**

Male	Female	Common/Neutral
mwana (child)	mwana	mwana
wakhanda (infant)		
woyamwa (suckling)		
wakumbuyo (on the back) <sup>50</sup>		
woyenda (walking)		
wothamanga (running)		
mabvimba (little children)	mabvimba	mabvimba
(youngsters)		
(kids)		
muopi (grown up but virgin)	muopi	
	mtsimba (pubescent)	
mnyamata (youth)	msungwana	achinyamata

<sup>49</sup> Compiled from interviews with Village Head Magombo, Gogo Mauluka and Gogo Sambalikagwa. See also DC Scott *A cyclopaedic dictionary of the mang'anja language*, (Edinburgh: Foreign Mission Committee, 1898) at p 422; DC Scott & A Hetherwick *A dictionary of the Chichewa language* (Blantyre: CLAIM, 1929).

<sup>50</sup> Mothers in Africa usually carry their babies on their back as prams or push chairs are not readily accessible. Even when they are, older members discourage their use as it is perceived to interfere with the bonding process between the mother and the child.

**Table 3: The social development of the child**

Male	Female	Common/Neutral
mwana (child)	mwana	mwana
osabvinidwa (uninitiated)		
osameta (uninitiated)		
namwali (undergoing initiation)	namwali	namwali
obvinidwa (initiated)	obvinidwa	obvinidwa
ometa (initiated)	ometa	ometa
mgagada (one who has left the (homestead to live on his own)	-	-
mbeta (single/unmarried)	namwali	namwali

Although the tables above are derived from the Chichewa language, similar patterns are also discernible in the Yao, Lomwe, Tumbuka and other Malawian languages.<sup>51</sup>

The amorphous nature of theories and models concerning childhood demonstrate its artificiality and unnaturalness. However, there is nothing new in suggesting that childhood is not a natural category. Few would dispute that it is a social, political, economic and moral construction and that it always relates to particular cultural histories and landscapes. Perhaps a more useful way of considering childhood is to analyse the concept as it relates to other forms of social transformation. This type of analysis is more useful because only then would one be able to place the African Children’s Charter within a contextualised notion of childhood. A transformative approach takes into account historical, social, economic and legal factors that affect

<sup>51</sup> See S Chimombo *Malawian proverbs and riddles in the context of the Convention on the Rights of the Child* (Lilongwe: UNICEF, 1998) at p 5.

the construction and understanding of the notion of childhood. In the following section, I outline the basis of an approach that takes into account changes in the perception of childhood and how this affects the location of the beneficiaries of the African Children's Charter.

### 3.1 The changing nature of childhood

The historian Philippe Aries was one of the first to argue that childhood has not always been as it is theorised today but emerges as part of the early modern period of industrialisation.<sup>52</sup> Thus, although children are present in every human society both across space and through time, it is nevertheless correct to say that childhood, as it is perceived nowadays in different societies, is a relatively recent phenomenon. As Mead and Wolfenstein have argued: 'Although each historical period of which we have any record has had its own version of childhood...childhood was still something that one took for granted, a figure of speech, a mythological subject rather than a subject of articulate scrutiny.'<sup>53</sup> Consequently, it would appear that the contemporary idea of childhood only emerged at a comparatively late stage in the historical process.<sup>54</sup>

Although Aries work was based on historical research into the lives of children from the Middle Age and onwards in western Europe, his study is nevertheless instructive in investigations into childhood elsewhere.<sup>55</sup> As Heywood argues, Aries thesis has provided scholars with a platform from 'which to mount a radical critique of thinking about children in their own society.'<sup>56</sup> For example, with respect to Europe Aries argues 'in mediaeval society childhood did not exist'. He stresses that although

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<sup>52</sup> P Aries *A social history of family life* (New York: A Knopf, 1962) at p 128.

<sup>53</sup> M Mead & M Wolfeisten *Childhood in contemporary cultures* (Chicago: Chicago University Press, 1954) at p 3.

<sup>54</sup> For example, Hoyles, focusing on the western conception of childhood, argues that: 'Both childhood and our present day nuclear family are comparatively recent inventions.' See M Hoyles *Changing childhood* (London: Writers and Readers Publishing Cooperative, 1979) at p 16.

<sup>55</sup> A James & AL James n 26 above at pp 12-13.

<sup>56</sup> C Heywood *A history of childhood* (Cambridge: Polity Press, 2001) at p 12.



younger members of the species clearly existed in the Middle Ages, they were not granted a special or distinctive status.<sup>57</sup> Once weaned, children were expected to participate and contribute within the family and the community at large according to their capabilities just as adults did. Aries argues that such practices existed because of a lack of awareness that children might require a different and specific kind of social experience. This awareness, he suggested, only gradually emerged from the fifteenth century onwards. In his view, therefore, the dawning of consciousness of children as being different and particular is marked out, over time, in the gradual social, political and economic institutionalisation of the idea of children's needs. This revolution in thought ultimately culminated in the establishment of age-based hierarchy and eventual dichotomy between adults and children.<sup>58</sup>

Commenting on trends in the USA, Zelizer observes similar patterns in the construction of childhood.<sup>59</sup> Focusing on the relatively recent period encompassing the beginning of the nineteenth through to the twentieth centuries, he argues that there have been significant changes in the economic and affective value of children during that period. By investigating the changing attitudes within the family and in the public at large towards issues such as child labour, child mortality, child care, adoption and abandonment, she argues that children shifted from having some dubious economic value to immeasurable or 'priceless' emotional value. Consequently social attitudes relating the nature of child rearing and child protection have also undergone significant changes in correspondence to these changes in the perception of childhood.

Global studies on childhood have also demonstrated that in all societies, conceptions of childhood have proven to be anything but invariant.<sup>60</sup> With regard Africa, Bart Rwezaura traces the changes that have influenced the conception of childhood in the

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<sup>57</sup> P Aries n 52 above at p 125.

<sup>58</sup> JS Lafontane n 29 above.

<sup>59</sup> See generally VA Zelizer *Pricing the priceless child: The changing value of children* (New York: Basic Books, 1962).

<sup>60</sup> See generally T Skelton & G Valentine *Cool places: Geographies of youth cultures* (London: Routledge, 1998); M Mead & M Wolfeisten n 50 above and S Stephen *Children and the politics of culture* (New Jersey: Princeton University Press, 1995).

social and legal systems of Africa.<sup>61</sup> According to his analysis which details significant aspects of the image of childhood during the pre-colonial, colonial and post-colonial eras, Rwezaura remarks that the perception of children as a resource that could be deployed to enhance the family's welfare has been modified by new ideas which emphasise the parents' duties towards children. However, this shift in perception has not displaced the old conceptions so that the new perspectives do compete with the old.

The discussions detailed above demonstrate that the conception of childhood has showed a great deal of cultural relativity both across time and across space. This has alerted researchers to the diverse as opposed to the universal nature of the conception of childhood.<sup>62</sup> Childhood is, therefore, one and at the same time common to all children but also fragmented by the diversity of children's every day life in different cultural settings. Thus, although adults have been, and remember having been, children and will therefore have some experiences in common, the 'childhood' of the current generation of children will undoubtedly be different from that remembered by their parents. Thus, although childhood as a social space does remain universal,<sup>63</sup> its temporal location within the timelines of generational history means that its character nevertheless changes over time, shaped by changes in laws, policies, discourse and social practices through which childhood is defined.

Construed in this manner, childhood may thus be perceived as a developmental stage of the life course common to all children and characterised by basic physical and developmental patterns. However, the ways in which this is interpreted and, understood and socially institutionalised for children by adults varies considerably between cultures and generations. Core to this observation are two critical propositions. Firstly, that childhood cannot be regarded as an unproblematic descriptor of a natural biological phase. Rather, the idea of childhood must be regarded as a very particular cultural phrasing of the early part of the life course,

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<sup>61</sup> See generally B Rwezaura 'Competing images of childhood in the social and legal systems of contemporary sub-Saharan Africa' (1998) 12 *International Journal of Law, Policy and the Family* p 253.

<sup>62</sup> P Henderson n 33 above at p 14.

<sup>63</sup> J Qvortrup *Childhood matters: An introduction* (Avebury: Aldershot, 1994) at pp 5-6.

historically and politically contingent and subject to change. Secondly, that the way children are regarded necessarily determines the kind of experiences they have as children and also, therefore, their own responses to and engagement with adults and the adult world.

Thus, change is an aspect of childhood that is critical in defining and shaping its parameters.<sup>64</sup> The changing conception of childhood is, therefore, a useful tool in locating children and children's rights in any framework for the protection and promotion of their rights and welfare. With regard to the geographical location of this study, it is critical to examine not only the conception of childhood within this particular locale but to examine how changes in the social, economic, political and cultural dynamics have influenced the perspectives of childhood at play in contemporary Africa. More importantly, it is essential to consider how this aspect of childhood affects the promotion and protection of the rights and welfare of the African child.

What the discussion detailed above demonstrates is that any conception of childhood is susceptible to and accommodative to change. New ideas such as the contemporary notions of children's rights are capable of becoming part of the social practices that constitute childhood. In the next section, I discuss how this changing nature of childhood manifests itself within the African context.

### **3.2 The conception of childhood within African communities**

Although the duration of childhood is much shorter in African traditional society than its equivalent in western Europe, childhood is not a recent social phenomenon in African societies.<sup>65</sup> However, its duration has not watered down its cultural or political significance. Within African societies, childhood has always been regarded

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<sup>64</sup> See Committee on the Rights of the Child *General comment no 7: Implementing children's rights in early childhood* CRC/C/GC/7/Rev.1 (2006) para 8 available at <<http://www.ohchr.org/english/bodies/crc/docs/AdvanceVersions/GeneralComment7Rev1.pdf>> (accessed on 21 January 2002).

<sup>65</sup> B Rwezaura n 61 above at p 255.

as the time to grow up, to learn, to build character and acquire the social and technical skills necessary for participation in adulthood.

During the fieldwork, interviewees often distinguished between *chinyamata chakale* and *chinyamata chamasikuano*, that is between traditional and current conceptions of childhood thus highlighting the element of change. However, younger interviewees often described this distinction as mere nostalgia by the older folk. Although there are some differences between the conception of childhood in traditional society and its equivalent in contemporary African societies, it is also the case that elements of the old have shaped the character and content of current conceptions.<sup>66</sup> It is, therefore, difficult to make sharp distinctions between what is 'old' and what is 'new' when one is investigating childhood. Below, I attempt to outline some key aspects of the 'contemporary' perception of childhood.

Amongst the Lomwe people, children are taught from an early age to acquire skills that will be essential during their adult, and preferably married, lives. The mode of socialisation is diverse, informal and sometimes indirect, depending on the particular skills or matter being imparted. A significant component relies on both passive as well as participant observation as well as role-playing of parents and older children.

During play young boys mimic the roles of adult men. This happens from an early age and boys as young as four or five years old play fathers and families. They acquire wives, build imaginary homesteads, discipline children, organise their 'families' activities and distribute family wealth. Although some children displayed a significant amount of imagination and initiative during the role playing, their behaviour often mirrored that which happens in their own homes. Thus, a gentle 'father', I was told, was most definitely a product of a home where the father treated his children with affection. Hence the proverb *chinvano cha mavu n'choning'a pa mimba* (the unity of the wasps: they all have narrow waists).<sup>67</sup>

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<sup>66</sup> For an instructive discussion on the 'new images' of childhood in sub-Saharan Africa, see B Rwezaura n 61 above at p 264.

<sup>67</sup> This proverb is an equivalent of the English proverb: Like father, like son.

Older boys also have a very important role during this learning process. For example, when they are out in the fields or herding cattle and goats, they instruct the younger ones in physical combat and self-defence skills. Instruction is given on how to defend themselves, their crops or animals against thieves and wild animals. The youngsters are encouraged to be brave and to face danger like men. Thus, by the time a child becomes *namwali* (one who is undergoing or about to undergo initiation), he will have acquired significant knowledge about his physical environment as well as his future role as an adult and a father, and through role playing, he will have gained valuable practice in the various skills that may be required of him later in life.

As boys get older, usually around their pubescent age which is around twelve years of age, they are also taught some economically useful skills in addition to the chores around the house. These new activities include skills such as house construction, granary construction,<sup>68</sup> fence construction and mat and basket weaving. In addition to the skills outlined above, Yao boys are also taught boat building and fishing skills. Thus, at these ages, boys are significant actors in the economic landscape of the community and their families and are expected to contribute both materially and in terms of labour to the upkeep of the homestead.

Although during early childhood young girls do not segregate themselves from their male counterparts and are often seen playing together, their socialisation is markedly different from that of the boys. Hence, from the onset, children adopt gendered roles and girls imitate mothers and wives in their role play. When they are sufficiently grown, girls are assigned to carry out domestic chores such as looking after their younger brothers and sisters when the older parents and children are away working in the fields. Again, older girls assume a great deal of responsibility in the socialisation of their siblings, imparting to them a variety of skills that will be essential in their future roles as wives, mothers and carers. Some young interviewees intimated that it was training received from an older sister was preferable to that provided by a mother because unlike in the latter situation, sanction or disapproval does not always follow

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<sup>68</sup> It used to be the custom in the old days that a suitor would have to build a granary before he would be allowed to take a daughter as a family. Granary construction was, therefore, a very important skill to acquire if one were to have any hope of starting his own family.

failure given the *uchemwali* or sisterhood that underlies the former relationship. That said, it is important to note also that the relationship between a mother and her daughters is dynamic and is geared towards reaching their full potential as *osunga mudzi* (keepers of the family).

When the girls reach puberty, they are taken for initiation. During this ceremony they are given instruction relating to sex and sexuality and skills on how to maintain positive relations with their prospective husbands and their kin. Initiates are also taught how to behave responsibly given that having become privy to information reserved for grown-ups, they are no longer ‘children’ but ‘adults’. They are, therefore, told that they are expected to behave with the sense of dignity and respect that reflects positively on their families as well as future prospects as suitable wives and homemakers.

With regard to boys, initiation does not only take the form of instruction but also includes circumcision. After initiation, it is usual for Lomwe boys to change their names and adopt names befitting their status as new entrants into the club of adults. It also offers an opportunity for the initiates to discard names that they do not like or that cause them embarrassment. Boys’ initiation takes place away from the homestead, and when they graduate, they can no longer sleep in their parents’ house but must establish a *kuka* or *gowelo* (youngman’s den) for themselves. Usually, the initiate together with his father and other relatives will have made arrangements for the building of the *kuka* before going for initiation but will not live in it until he has completed the initiation process. Once he moves into the *kuka*, no one may call him by his first name but must address him by his clan name or the name of his father. The independence which the initiated achieve is an attribute of further privileges which accrue after initiation and which ultimately culminate in marriage and the establishment of one’s own family.

There are a number of ethnographic studies which confirm African childhood and socialisation as preparation for adult life and adult roles. For example, Effa Okupa’s study of the ovaHimba of Kaokoland in northern Namibia offers an instructive

rendition of their practices and philosophy with regard to childhood.<sup>69</sup> According to Okupa, virtue is the umbrella principle that informs the socialisation of Himba children. Consequently, in imparting knowledge and social skills, parents, guardians and the rest of the community focus their instruction on concepts such as love compassion, trust and not so much on the tradition of duty because in terms of Himba philosophy, being virtuous and helping others is good and sufficient in itself and is not considered as apart of one's duty to society. Duty, the ovaHimba argue, implies an element of coercion and nobody can continue doing something under compulsion for the rest of his or her life. There are, thus, no prisons, threats of physical punishment or ostracism, but only doing what one considers virtuous.<sup>70</sup>

By the age of puberty, apart from the acquisition of the virtues, ovaHimba children will also have learned about other important and useful aspects of their lives and their society. This knowledge includes knowledge of whom they should marry; how they are going to marry; how to look after their families and their own children. Like the Lomwe and Yao of Malawi, Himba children are accorded various privileges as they journey through life towards adulthood. Consequently, when they reach puberty and are taken for initiation and upon graduation they are granted rights and privileges associated with adulthood.

Bart Rwezaura's study of the Kuria children and their various life skills also emphasises the existence of competence-based system of privileges. According to his study which was carried out in Tanzania, children are assigned roles as they grow up, with increasing responsibility depending on the evidence of maturity.<sup>71</sup> Rwezaura further notes that apart from instruction in production techniques, African children are also taught good manners, encouraged to develop a wholesome personality that is imbued with a sense of respect for older members of the community.<sup>72</sup> This aspect of childhood socialisation was considered of great importance by both young and old interviewees. *Ulemu*, the local word for respect is often associated with *umunthu* or

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<sup>69</sup> E Okupa *Ethno-jurisprudence of children's rights: A study of the Himba of Namibia* (PhD thesis, University of London, 1996).

<sup>70</sup> As above at p 216.

<sup>71</sup> B Rwezaura n 61 above at p 255.

<sup>72</sup> As above at p 256.

human-ness itself. The duty to give respect also translates to providing for one's parents when they get old.<sup>73</sup>

However, whereas some aspects of the above traditional view of childhood remains current and applicable, it has also been contested on many fronts since the advent of the post-colonial era. Although it was not possible during the fieldwork to analyse the extent to which the aspects of childhood described above are observed within contemporary families, it was nonetheless clear from the evidence that major changes had affected the traditional image of childhood.

The introduction of the cash economy, Middle Eastern religions, class room based education and more recently, the advent of globalisation has resulted in the radical alterations towards the character of traditional African childhood.<sup>74</sup> These new paradigms have brought a great deal of tension between parents, guardians and children. During the fieldwork, parents often described children as lacking respect. However, when confronted with this charge, the children responded that the parents were living in the past and that they simply were refusing to acknowledge that the times had moved on. These misalignments of perspectives are a direct consequence of dynamic changes within the African communities. In this regard, it has been observed that in the period following colonial rule, ideas based on the European conception of childhood slowly filtered into the African social fabric. As new economic structures, Christianity and western values and tastes started to get their hold on local social structures, communal conceptions of childhood slowly but gradually metamorphosed.<sup>75</sup> This process resulted in the disengagement and modification of

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<sup>73</sup> The African Children's Charter recognises this duty in article 31 where it provides, among other things, that 'the child...shall have a duty to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need. This duty mirrors that proclaimed by the American Convention on Human Rights (adopted on 22 November 1969(entered into force 18 July 1978) O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123) at article 32(1) where it provides that 'every person has responsibilities to his family, his community, and mankind.'

<sup>74</sup> B Rwezaura n 61 above at p 264.

<sup>75</sup> See generally M Mbilinyi 'Runaway wives in colonial Tanganyika: Forced labour and forced marriage in Rungwe District 1919-1961' 1988 *International Journal of the Sociology of Law* p 305 and B Rwezaura n 61 above at p 264.



various aspects of the traditional view of childhood and the incorporation of certain western or European ideas regarding children and their place in society. The result was the gradual development of a new conception of childhood, African in form yet bearing the distinct imprint of western influence. This merging of conceptions is what makes it very difficult to demarcate with clinical precision what is 'old' and what is 'new'.

The above analysis demonstrates how old and new ideas regarding childhood interrelate, reinforce and change each other. It is accepted that the concept of 'African childhood' is being used very loosely here; and it is also acknowledged that specific practices will vary widely across the diverse communities in Africa. However, it is submitted that change, which was described as the only constant factor as regards the image of childhood; takes place across all these social landscapes and hence that this analysis applies in all these contexts.

In the next section, I examine the relationship between childhood and children's rights by analysing how changes in the perception of childhood have coloured legal policy and reform in favour of the promotion and protection of the rights and welfare.

#### **4 The relationship between childhood and children's rights**

In any society, the rights and roles assigned to children are intimately connected with the underlying premises regarding the nature of childhood. Whether the basic thesis is that children are immature, vulnerable and incapable of making important life decisions<sup>76</sup> or that they are essentially autonomous and capable of independent thought,<sup>77</sup> societal perceptions on childhood have coloured the make up of the laws,

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<sup>76</sup> N Lee *Childhood and society: Growing up in an age of uncertainty* (Buckingham: Open University Press, 2001) at pp 21-35.

<sup>77</sup> For an instructive discussion on children's autonomy and their rights to self-determination, see generally J Eekelaar 'The interests of the child and the child's wishes: The role of dynamic self-determinism' (1994) 8 *International Journal of Law and the Family* p 42; and on the concept as it relates to adults, see J Rawls *A theory of justice* (Oxford: Oxford University Press, 1971) at pp 90-95 and 130-136.

policies and other interventions relating to children.<sup>78</sup> The fact that conceptions of childhood are so firmly rooted in societies where particular legal, economic and social structures are created and maintained has very important implications for children's rights and change. Consequently, if one's perception of children's rights is determined primarily by one's conception of the nature of children and if that conception is deeply embedded in a particular social atmosphere, then major changes in the scheme for allocating children's rights may have to be accompanied by equally major structural and institutional changes.

Additionally, it is important to acknowledge that just as varying conceptions of childhood have emerged over the centuries, differing attitudes may also co-exist within a particular society. The challenge, then, is not only to articulate an appropriate framework of core children's entitlements or rights but also to identify the current conceptions of childhood and children's rights and then seek to locate the legal and institutional frameworks for the protection of children within that framework.

If the contention that the character and quality of children's rights protection is interlinked with prevailing conceptions of childhood is correct, it is not only interesting but critical to investigate the conception of childhood that has influenced the international law on the rights and welfare of the child and determine its suitability to the African context. This is necessary in light of the fact that the scheme of protection envisaged under the African Children's Charter was greatly influenced by children's rights prescriptions at international law.

#### **4.1 The image of childhood underlying the international law of children's rights**

The key tenet of contemporary rights and welfare discourse is that the regulation of children's lives should be principally aimed at making childhood a carefree, safe, secure and happy phase of human existence.<sup>79</sup> In order to achieve this, experts have

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<sup>78</sup> N Lee n 76 above at p 87-95.

<sup>79</sup> See generally, J Somerville *The rise and fall of childhood* (New York: Sage Publications, 1982).

therefore recommended the creation of appropriate contexts, relationships, spaces and behaviours that children ought to experience. The resulting image of childhood has been that of 'properly loved children belonging in a domesticated, non-productive world of lessons, games and token money.'<sup>80</sup> Thus, the contemporary, essentially sentimental, approach to childhood is at the same time both nurturing and constraining, so that in the modern industrial world:

The instrumental value of children has been replaced by their expressive value. Children have become relatively worthless (economically) to their parents, but priceless in terms of their psychological worth.<sup>81</sup>

Significantly, however, the norms and values upon which this ideal of a happy and protected child are built are culturally and historically bound to the social preoccupations and priorities of the industrialised western societies. It is a model of childhood that is complete - with legislative frameworks, policies, codes of welfare practice and an army of enforcement agencies and personnel. More significantly, however, it is a model of childhood which is very particular in its genesis having resulted from the historical, social and economic interaction of the Judaeo-Christian belief systems and changes in the productive and demographic base of a society corresponding with capitalist development.

The expansion of capitalism in the last century has given the greatest impetus to this image of the ideal childhood.<sup>82</sup> The central tenet of this image of childhood was the assumption that children are essentially different from adults and, therefore, that their social needs were different from those of adults. Explicit in this notion of childhood is the notion that children are immature and vulnerable and that consequently, they must be protected both from themselves and others who might otherwise do them harm. Consequently, children were sequestered into schools, playgrounds, children's hospitals and young offenders' institutions and were not permitted legitimate access into the 'adult' spaces of public life and the workplace. Due to the structure of the

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<sup>80</sup> VA Zelizer n 59 above at p 15.

<sup>81</sup> N Scheper-Hughes *Child survival: Anthropological perspectives on the treatment and maltreatment of children* (Dordrecht: Reidel, 1989) at p 21.

<sup>82</sup> J Qvortrup n 63 above at pp 129-149.

new vision of childhood, the extended family fell into rapid decline and the nuclear family emerged as the predominant household model from which child socialisation took place. Children's minds became the specialised territory of child psychologists, child lawyers and educationalists and their bodies the object of the paediatrician's curiosity.<sup>83</sup> With the aid of the law and social policy, these processes became institutionalised as the ideal model of childhood within the industrialised nations of the west.

## 4.2 Children's rights and the dominant image of childhood

In addition to colonialism, Christianity and democracy, the twentieth century has managed to export the western conception of childhood to the developing countries of the south. This view of childhood has proved a critical determinant for the development of children's rights legislation and social policy both at the international level as well as within the domestic setting. In fact, it has been the explicit goal of children's rights specialists and activists to crystallise within the international law framework a universal system of child rights based on this conception of childhood.<sup>84</sup>

The image of childhood revealed in the CRC whereby the child develops his or her personality in 'an atmosphere of happiness, love, understanding' shielded from adult responsibilities towards 'an individual life in society'<sup>85</sup> is culturally grounded to the historicity of the western nations.<sup>86</sup> However, such a vision of childhood whereby children are free from productive activities or other responsibilities is a luxury that developing countries are unable to universalise in their current circumstances.

One of the main links between international children's rights legislation and traditional child welfare thinking is that both have been influenced by the ideologies of social work and the legal profession. This influence is extremely significant for the development of a global standard of childhood because both tend to play down the

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<sup>83</sup> B Mayall n 37 above at pp 243-244.

<sup>84</sup> A James & AL James n 26 above at pp 78-106.

<sup>85</sup> CRC, Preamble, paras 5 & 6.

<sup>86</sup> A Bar-On 'Criminalising survival: Images and reality of street children' (1996) 26 *Journal of social policy* p 63 at p 66.

impact of wider social, economic, political and cultural conditions in the shaping of social phenomena and, therefore, to advocate non-contextualised remedial solutions to children's problems all over the world. However, whilst contemporary approaches in social work in many industrialised countries may have moved a long way from the original premises, their influence can still be seen in the child welfare practice, policies and laws of many countries of the South.<sup>87</sup>

Furthermore, these approaches to childhood have coloured the development of child law since the early part of the twentieth century beginning with the promulgation of the Geneva Declaration of the Rights of the Child in 1924 ('the 1924 Declaration').<sup>88</sup> This Declaration provided the blueprint for the development of a universal ideal. It specified a series of rights for children that were separate from and in addition to those of adults. As with the dominant conception of childhood in western society, the golden thread was the vulnerability of children and how, in light of this important recognition, children could be nurtured and their childhood protected in their best interests.

As the century progressed, successive international instruments and human rights milestones have progressively refined their understanding of the special needs and attributes of childhood. The language has changed from mere hortatory exultations as with the 1924 Declaration to entitlement based catalogues. However, the underlying rationale and philosophy has remained the same. Measures have included the 1959 UN Declaration on the Rights of the Child ('the 1959 Declaration'),<sup>89</sup> the UN International Year of the Child,<sup>90</sup> as well as a plethora of other international statements and declarations of varying levels of significance and scope.<sup>91</sup> However,

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<sup>87</sup> J Boyden 'Childhood and the policy makers: A comparative perspective on the globalisation of childhood' in A James & A Prout *Constructing and reconstructing childhood: Contemporary issues in the sociological study of childhood* (London: The Falmer Press, 1990) p 190 at pp 192-194.

<sup>88</sup> League of Nations Official Journal (1924) Records of the fifth assembly, supplement no. 23.

<sup>89</sup> GA Res 1386 XIV.

<sup>90</sup> A James & AL James n 26 above.

<sup>91</sup> See generally the materials in G van Bueren (ed) *International documents on children* 2nd ed (Amsterdam: Kluwer Law Publishing, 1998).

amongst all these, the CRC represents the most comprehensive attempt to universalise the dominant perspective of childhood.

The CRC has not only attempted to create for the first time in history, a truly international vision of childhood but it has also succeeded in establishing binding mechanisms for the review of its enforcement. These mechanisms<sup>92</sup> provide encouragement to governments to legislate and adopt policies aimed at giving effect to the provisions that lie at the heart of the Convention in all jurisdictions worldwide. This drive for the localisation of the CRC has raised several pertinent issues, precisely because childhood has hitherto been constructed quite differently within the diverse economic, political and cultural contexts that are the international community. Thus, by articulating the rights associated with childhood as a single undifferentiated collective social status, the CRC has managed to provide the first ever framework within which discussions about the nature of childhood and the rights of children around the world can take place.

Thus, through the device of international law, the western standards of child rearing have now become the global standard. And because of the rights language that has been adopted to push this agenda, such standards of child rearing and child welfare have become the basic human rights of all children everywhere. By setting these standards of welfare within the international human rights framework, it is implied that there exists an obligation to guarantee child welfare since embodied in the concept of a right is the existence of a direct claim upon someone else.<sup>93</sup> Thus, the positioning of the state as a guarantor of these rights and the provision of mechanisms for monitoring enforcement and compliance make the force of this new image of childhood very real indeed.

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<sup>92</sup> See CRC arts. 43, 44 and 45. See also A James & AL James n 26 above at p 82.

<sup>93</sup> In his classic analysis on the topic, Hohfeld opined that to have a right is to be owed a duty by another or others. A right is necessarily a claim against a person or persons who owe a corresponding duty to the right-holder. In the absence of the duty there could be no right. See WN Hohfeld *Fundamental legal conceptions as applied in judicial reasoning* (New Haven, Connecticut: Yale University Press, 1919). See also P Jones *Rights* (Houndsmills and London: Macmillan, 1994) at pp12-17.

International law has not been alone in peddling this image of childhood but has been assisted by a host of institutions and processes both at the international and domestic level. In this regard, a number of UN specialised agencies as well as a significant number of prominent international non-governmental organisations have been at the forefront preaching the gospel of child welfare and how this should be achieved. For the past sixty years, the UN has been very busy with activities aimed at promoting enlightened and benign government on behalf of children; encouraging the establishment of social welfare, compulsory education, child labour legislation and health services. The blueprint for these interventions has been perspectives on childhood and children's needs baked in the kilns of western child welfare policy.<sup>94</sup>

However, whereas conceptions of childhood developed in the west have found a suitable niche in international children's rights law and policy, transplanting those conceptions into the social and legal systems of the south has not been plain sailing. In the next section, I discuss several problems emanating from the export of ideal childhoods.

### 4.3 Obstacles in the export of the dominant conceptions of childhood

As shown in the previous section, the images of childhood favoured in the industrialised western countries have been exported to the comparatively poorer states of the South. The view that childhood is a fixed notion determined by biological and psychological facts rather than culture or society is explicit in international children's rights legislation.<sup>95</sup> The rights lobby is in the forefront of the global spread of norms of childhood which are integral to the cultural, social and political history of Europe and North America. In this regard, Philip Alston has commented that international (human rights) lawyers tend to speak of the international human rights system as if it were indeed a single unitary system 'based upon sound and essentially unchallenged

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<sup>94</sup> For an instructive commentary on the philosophy behind child welfare policy in developing countries, see generally, J Midgley *The social dimensions of development, social policy and planning in the Third World* (New York: John Wiley and Sons 1982).

<sup>95</sup> V Pupavac n 5 above.

foundations, applying a reasonably clear, coherent and internally consistent set of norms.<sup>96</sup>

In similar vein, international children's rights lawyers and activists ignore the evidence that the conception of childhood and children's rights is ultimately and intimately bound up with the cultural values and outlook of any given society. Lejeune takes up the argument specifically in relation to the CRC which, since it does not make general statements but sets out particular rights in great detail; he says can only apply to a geopolitical area in which the same attitudes to law, the same political systems and compatible cultural traditions are firmly rooted.<sup>97</sup> Clearly, the global community is yet to reach this state of uniformity.

Although the idea of equality for all children is somewhat compelling, it is also true that different competencies and incapacities perceived to be associated with childhood in different societies are numerous and often imply contradictory conceptions of childhood. A simple example relating to the care of children would suffice to show marked differences between the capacity and hence the responsibilities that children are allowed to assume in different cultural and social contexts. For example, among the Lomwe in Malawi and indeed, amongst so many other groups on the African continent, children as young as six are often left to look after their siblings whilst parents and older children attend to other family chores. Indeed, during the fieldwork, I encountered several child-headed households whereby young children had taken over the responsibility of fending for their even younger brothers and sisters. In contradistinction, in many western communities such as Britain, parents may be liable for child neglect if they leave infants and small children under the supervision of other minors.<sup>98</sup> This observation is in no way meant to suggest that this solution to the

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<sup>96</sup> P Alston & M Quinn 'The nature and scope of states parties' obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) *Human Rights Quarterly* p 9 at p 11.

<sup>97</sup> See R Lejeune *Towards a European convention on the rights of the child* (Brussels: Council of Europe, 1984).

<sup>98</sup> See BUPA 'Leaving children at home' available at <[http://hcd2.bupa.co.uk/fact\\_sheets/html/leaving\\_children.html](http://hcd2.bupa.co.uk/fact_sheets/html/leaving_children.html)> accessed on (22 December 2006) citing Children's and Young Persons Act (1933). See also 'Father fined for leaving children alone' available at



problem of orphaned children is satisfactory but merely to demonstrate the differing perspectives regarding young children's capabilities to look after others younger than themselves.

Furthermore, whilst the global conception of childhood assumes uniformity in the manner through which children change from childhood into adulthood, the situation on the ground in different countries reveals a mosaic of eclectic practices.<sup>99</sup> Thus, whereas for the majority of societies in the west, adulthood is based on the age grade system and the age of majority signifies the be all and end all of milestones as far as acquiring the rights and privileges of adulthood is concerned; in many communities of the south like those in Africa, graduation into adulthood is not merely a question of computing a person's age but a process whereby one must demonstrate practical proof that he or she has become mature enough and therefore entitled to be treated as an adult.

However, the critical factor affecting the institutionalisation of the western model of childhood is not just the question of its relevance to the circumstances of children in developing countries. As Norman Lewis has argued, 'by setting this standard *southern childhood* is not only effectively erased from international view but the western model becomes the standard by which to judge *southern societies*.'<sup>100</sup> Thus, at a certain level of analysis, the prescription of an ideal model of childhood for African children may be repeating 'the colonial paternalism where the adult-Northerner offers help and knowledge to the infantilised South.'<sup>101</sup> Consequently, parents and guardians from the South are recast as child abusers and their child-rearing practices indicted as falling short of international children's rights standards. Surely a contextual rendering of the place of children in any society would reveal that their situation is also intimately

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<<http://news.scotsman.com/topics.cfm?tid=695&id=666952006>> (accessed on 22 December 2006).

<sup>99</sup> G Van Bueren n 28 above at pp 32-38.

<sup>100</sup> N Lewis 'Human rights, law and democracy in an unfree world' in T Evans (ed) *Human rights, fifty years on: A reappraisal* (Manchester: Manchester University Press, 1998) at p 95 (emphasis in the original).

<sup>101</sup> E Burman 'Innocents abroad: Western fantasies of childhood and the iconography of emergencies' (1994) 18 *Disasters* p 283 at p 241.

bound up with the material development of the society in which they live. As United Nations Children's Fund has argued, 'it would be philosophically unsound to regard the child as an isolated individual rather than an integral part of his family and community.'<sup>102</sup>

The proceedings of the UN Special Session on Children,<sup>103</sup> (convened under a 1996 direction of the UN General Assembly) reveal the potential problems that may emerge when attempting to legislate a global image of childhood. The Special Session which was held from 8-10 May 2002 was intended to bring together heads of state, non-governmental organisations, children's advocates and young people from around the world. The meeting was a follow-up to the 1990 World Summit for Children and the first time in the UN's history that the General Assembly had held a meeting devoted solely to issues affecting children and their lives. It was an opportunity to take stock and assess the progress that states had made in implementing the CRC.

However, this goal was not to be realised as political gamesmanship took centre stage and superseded critical and honest review. As a result, several points of contention arose during the drafting of the conference's declaration, *A world fit for children*.<sup>104</sup> The United States and a number of other states that are linked very closely with Christian and Islamic interests showed vigorous opposition to any reference to abortion, sex education, family planning and reproductive health. These countries also sought to limit references to 'children's rights' (notwithstanding that the principal document under consideration is called the Convention on the Rights of the Child) on the grounds that they considered it the parents' job to bring up children in the way that they know best. The US also opposed any statements seeking to limit the use of physical chastisement or capital punishment arguing that these were the prerogative of the parents and the state respectively. A host of other countries with strong religious

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<sup>102</sup> UNICEF *Children of the developing countries* (London: William Clowes, 1964) at p 14.

<sup>103</sup> UNICEF 'United Nations Special Session on Children' available at <<http://www.unicef.org/specialsession/>> (accessed on 22 December 2006).

<sup>104</sup> UNICEF *A world fit for children* (New York: UNICEF, 2002).

affiliation also opposed any references to 'family' with any other meaning other than mother, father and children.<sup>105</sup>

The dissonance between the global conception of childhood and the priorities of local constituencies was also evident amongst the agendas pursued by some of the non-governmental organisations that had been invited to attend the Special Session. In this regard, some observers noted that a large number of non-governmental organisations were more than ready to scupper proceedings if the tide was not in their favour. For example, 'some Islamic groups and Christian fundamentalist organisations showed...that they were prepared to break up meetings if their demands were not met.'<sup>106</sup>

There are, therefore, some real problems that arise in attempts to transplant one culture's conception of what constitutes an ideal childhood into the social structures of communities that observe and operate along a different ethos of childhood. It is, therefore, critical that any framework of children's rights that represents 'universal ideals' must be alive to this fact and must provide mechanisms for mediating any potential conflict for the greater good of the rights and welfare of the child. In discussing this proposition within the context of the African Children's Charter, I return to the theme of the changing conceptions of childhood in contemporary Africa which I briefly introduced in my analysis above. In the paragraphs below, I critically examine some important aspects of these changes in perception and outline the reasons why the new perspectives are conducive to the operationalisation of the African Children's Charter.

#### **4.4 Childhood and the African Children's Charter**

It has been noted elsewhere that in order for the African Children's Charter to be effective, its substantive provisions as well as the procedural arrangements under it

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<sup>105</sup> See Children's Rights Information Network 'Special Session update no. 1 Tuesday 7 May 2002' in *NGOs working together for the UN General Assembly Special Session on Children* (2002a).

<sup>106</sup> Children's Rights Information Network 'Special Session update no. 1 Tuesday 7 May 2002' in *NGOs working together for the UN General Assembly Special Session on Children* (2000b).

must be culturally legitimate if its stated aim of protecting the rights and welfare of African Children is to be realised. Consequently, with regard to its conception of childhood, it is critical that this element must comport very well with the philosophical and cultural understanding of the concepts within the African context.

It has been observed above that any conception of childhood is ultimately shaped by the social, cultural, political and economic dynamics that are at work in any society. Changes to conceptions of childhood will, therefore, often be the result of changes in these dynamics. In the context of Africa, the image of childhood that was current during the pre-colonial and pre-capitalist era has greatly been influenced by the introduction of Christianity and the money economy as major forces of the social structure. These forces had a tremendous impact on the way of life of the community and the manner in which kinship ties were organised and managed. More importantly, however, these changes introduced European ideas of childhood and child welfare into the African social landscape. This process resulted in the development of a new image of childhood bearing elements of the western models yet possessing a definite African cultural fingerprint.<sup>107</sup> This process of change has not only transcended and transformed the social landscape but has also had a profound impact on the legal landscape as the new ideas relating children and childhood have gained a substantial foothold in the form of child welfare and child protection laws.<sup>108</sup>

Various developments at the international, regional and domestic level have revolutionised the way childhood is viewed and have consequently changed the nature and scope of protection available to the African child. At the international level, not only have African countries ratified the CRC en masse but a great deal have gone further and submitted initial and periodic reports to the UN Committee on the Rights of the Child. African states also played a significant part in the 1990 UN World

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<sup>107</sup> M Mbilinyi (1998) p 305.

<sup>108</sup> B Rwezaura 'Domestic application of international human rights norms protecting the rights of the girl-child in Eastern and Southern Africa' in W Ncube (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (Aldershot: Ashgate Dartmouth, 1998) p 28 esp at pp 36-43. See also B Rwezaura 'Law, culture, tradition and children's rights in Eastern and Southern Africa: Contemporary challenges and present-day dilemmas' in W Ncube (1998) p 289pp 303-311.

Summit for Children which drew up the World Declaration on the Survival, Protection and Development of Children and Plan of Action.<sup>109</sup> More recently, African countries participated in the 2002 UN General Assembly's Special Session on Children and confirmed their commitment to the ideals in the CRC and of the image of childhood propounded in that document.<sup>110</sup>

At the regional level, the milestone remains the instrument which is also the subject of this thesis, the African Children's Charter. This initiative by African states has been buoyed by the recent commencement of the work by the African Committee of Experts on the Rights and Welfare of the Child which is tasked with the mandate of supervising the implementation of the African Children's Charter.

At the national level, changes to the conception of childhood have been evidenced by the inclusion in national constitutions of key provisions relating to the rights and welfare of the child. States such as South Africa, Ethiopia and Sierra Leone have thus accorded the rights and welfare of the child constitutional status. For example, section 28(1) of the Constitution of South Africa<sup>111</sup> offers children protection from maltreatment, neglect, abuse or degradation, exploitative labour practices and guarantees the right to basic nutrition, basic shelter, basic health care and social services. In line with international standards, section 28(2) stipulates that 'a child's best interests are of paramount importance in every matter concerning the child.' Julia Sloth-Nielsen has hailed the inclusion of this standard as a constitutional principle noting that given its status, it will necessarily 'become a benchmark for reviewing all proceedings in which decisions are taken regarding children.'<sup>112</sup> Ghana also has

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<sup>109</sup> Adopted at the World Summit for Children, New York, USA, 30 September 1990.

<sup>110</sup> Information regarding this session is available at a special website maintained by UNICEF <<http://www.unicef.org/specialsession/>> (accessed on 22 January 2006).

<sup>111</sup> The text of the South African Constitution may be accessed at <<http://www.info.gov.za/documents/constitution/index.htm>> (accessed on 22 December 2006).

<sup>112</sup> J Sloth-Nielsen 'Chicken soup or chainsaws: Some implications of the constitutionalisation of children's rights in South Africa' in R Keightley (ed) *Children's rights* (Cape Town: Juta & Company Limited, 1996) p 25.

provisions devoted solely to children's rights.<sup>113</sup> Section 28 guarantees every child the right to the same measure of special care, assistance and maintenance as is necessary for its development. The provision also proclaims that in all cases, the best interests of children are paramount. Likewise, the Constitution of the Federal Democratic Republic of Ethiopia (1994)<sup>114</sup> provides at section 36 (4) that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative bodies or legislative bodies, the best interests of the child shall be a primary consideration.

These developments at the constitutional level have also been augmented by revolutionary strides at the statutory level. In this regard, encouraging progress has been made in the enactment of laws intended to implement the provisions of the CRC and the African Children's Charter. For example, South Africa is in the process of enacting a Children's Bill. In the terms of the Bill, the provisions of the Act will apply to any person under the age of eighteen. Chapter 3 of the Bill outlines an extensive catalogue of rights ranging from basic rights such as the right to a name;<sup>115</sup> and the right to be protected from harmful cultural practices,<sup>116</sup> to sophisticated rights such as the right to have access to health information, sexuality, reproduction and the prevention of ill health and disease.<sup>117</sup> Like the Constitution, the Bill also adopts the best interest's standard,<sup>118</sup> and in this regard section 6 elaborates the factors that must be taken into account when applying the standard. More significantly, however, section 8 stipulates that the provisions of chapter 3 of the Bill shall take precedence over any other legislation inconsistent with them. Thus, it is obvious that South Africa, at least in terms of the legal framework, has totally embraced the key elements of the emerging image of childhood which is based on securing key entitlements for

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<sup>113</sup> The text of the Ghanaian Constitution may be obtained from <[http://www.parliament.gh/const\\_constitution.php](http://www.parliament.gh/const_constitution.php)> (accessed on 12 November 2006).

<sup>114</sup> The text of the Ethiopian Constitution may be obtained from <[www.ethiopianembassy.org/constitution.pdf](http://www.ethiopianembassy.org/constitution.pdf)> (accessed on 22 December 2006).

<sup>115</sup> South Africa Children's Bill, sec 11(1)(a).

<sup>116</sup> South Africa Children's Bill, sec 12.

<sup>117</sup> South Africa Children's Bill, sec 13.

<sup>118</sup> South Africa Children's Bill, sec 9.

children as of right as opposed to giving them rights as rewards after passing certain qualifying tests or as acts of charity.

Another country which has made significant strides in advocating and implementing the ideals promulgated in the CRC is Uganda. The Ugandan Children's Statute<sup>119</sup> has incorporated as a paramount consideration the welfare of the child in all actions taken by the state, administrative authorities or any person concerned with the upbringing of a child or the administration of a child's property. In elaborating the best interests principle, the Children's Statute offers a checklist modelled along the English Children Act 1989. One of the guidelines is that a child shall have the right, 'in addition to the rights stated in this Schedule and in this Statute, all the rights set out in the UN Convention on the Rights of the Child and the OAU Charter on the Rights and Welfare of the African Child, with appropriate modifications to suit the circumstances of Uganda.'<sup>120</sup>

Kenya has also taken steps to implement the new child laws. The Preamble to the Children Act 2001<sup>121</sup> states that the purpose of the Act, among other things, is to give effect to the principles of the CRC and the African Children's Charter. Part II of the Act, therefore, fleshes out the particulars of the safeguards for the protection of the rights and the welfare of the child. The provisions closely resemble the normative prescriptions that are contained in both the African Children's Charter and the CRC. Amongst a comprehensive catalogue of prescriptions, the provisions cover areas such as the child's survival, development and best interests,<sup>122</sup> non-discrimination,<sup>123</sup> the right to parental care,<sup>124</sup> the right to education,<sup>125</sup> and the right to health care.<sup>126</sup> Section 3 of the Act compels government to take steps to the maximum of its

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<sup>119</sup> Statute No. 6 of 1996.

<sup>120</sup> See Uganda Children's Statute, Guiding Principles in the Implementation of the Statute, Schedule I. The Act, however, gives no direction on the criteria that will be used when making the said modifications.

<sup>121</sup> Act No 8 of 2001.

<sup>122</sup> Kenya Children's Act, sec. 4.

<sup>123</sup> Kenya Children's Act, sec 5.

<sup>124</sup> Kenya Children's Act, sec 6.

<sup>125</sup> Kenya Children's Act, secs 7 & 8.

<sup>126</sup> Kenya Children's Act, sec 9.

available resources with a view to realising the rights and welfare of the child. Somewhat controversially, however, the Act allows *any* person who has grounds for alleging that any of the provisions relating to the rights and welfare of the child are being violated in relation to *any* child to bring an action before the High Court for redress on behalf of the child.<sup>127</sup> This provision highlights the importance with which the government of Kenya views the new image of childhood and the lengths that it would go to in order to protect it. Significantly, the Act also incorporates one of the defining features of the African Children's Charter by providing for the duties of the child.<sup>128</sup> In particular, the Act stipulates that the child has a duty to preserve and strengthen the positive cultural values of his community in his relations with other members of that community.

Several other African countries are also currently undertaking law reform processes in order to bring their laws in line with the prescriptions of the CRC and the African Children's Charter. Some of these countries include Malawi, Tanzania and Lesotho.<sup>129</sup>

It is clear from the foregoing that the new image of childhood which is based on age regardless of competence or economic usefulness in the home or in the community is gaining a steady foothold across Africa. What is remarkable about this new image of childhood in Africa is that it is so firmly established at the level of the legal framework and that it is influential in the development of state policy. The tale is not so conclusive when it comes to actual observation and practice on the ground. Consequently, efforts aimed at securing the implementation of both regional and domestic interventions on the rights and welfare of the children the danger of being derailed because of differences in the conception of childhood between the formal or legal level and the grassroots. There is, therefore, need to consolidate the new image of childhood not only at the level of positive law but also at the institutional and local level.

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<sup>127</sup> Kenya Children's Act, sec 22(1).

<sup>128</sup> See African Children's Charter, art 31.

<sup>129</sup> See Government of Lesotho 'Children's Protection Act 1980 revisited' available at <<http://www.lesotho.gov.ls/articles/2003/Child%20Protection%20Act%201980.htm>> (accessed on 22 December 2006).



#### 4.5 Consolidating the new image of childhood in favour of the rights and welfare of the African child

At the end of a rather animated conversation about children's rights, Mr. John Mbewe, a fish vendor at Thyolo District Market, gave me a message to pass on 'to the people in government.' This is what he told me:<sup>130</sup>

You people from the government think we are not intelligent because we live in the village. I will tell you one thing, poverty has nothing to do with intelligence or the ability to thoroughly think issues. All these years, we have been raising our children, making sure that they turn out right. Suddenly, all sorts of people come here and tell us: 'This is how you should do it. This is how you should do it.' The way we were brought up, this is not how we do things. You do not sit in an office on a comfortable chair and shout down at people who are sitting on a stone. The proper way is for you to come down from that comfortable chair, pick your own stone and say: 'How are you?' After that, you can then tell people that you have ideas which you would like to share. If there is some roast maize, we will pass it around and listen to your stories. We will even tell you stories of our own. These things about children's rights are good. They describe things that we have been doing for a long time. Even my grandmother observed these children's rights that you talk about. It just was not termed 'children's rights'. But if you come here and shout at us: 'Don't do this, don't do that, then you are treating us like we cannot think for ourselves. Let us sit down and talk about this. Stop shouting at us from your offices.

This conversation highlights three critical points regarding initiatives aimed at securing the new image of childhood. Firstly, the new image of childhood which emphasises rights as opposed to charity needs the full cooperation of families and other actors in the social spaces in which African children find themselves. It is, therefore, crucial that these constituencies are co-opted in the implementation of the African Children's Charter. The instrument itself largely delegates this duty to the state but also puts in place mechanisms to ensure that governments are carrying out their obligations.

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<sup>130</sup> I can do no better than quote this part of the interview verbatim as it expresses the very real frustration that may arise with inappropriate modes for introducing the concepts in the African Children's Charter.

Secondly, it is clear that the passing of laws is only a beginning. However, it also serves as a strong signal which might be taken up by society's institutions.<sup>131</sup> Unimplemented, partially implemented or badly implemented laws may actually do the institutionalisation of aspects of the new image of childhood more harm than good.

Thirdly, in advocating for the normative prescriptions of the African Children's Charter, it is critical that advocates and policy makers do constructively engage with the African conception of childhood; and that they adopt its positive aspects as a platform for implementing new ideas regarding childhood. The African Children's Charter itself does advert to the need for such an approach by declaring that the values of African civilisation should inspire and characterise the conception of the rights and welfare of the child<sup>132</sup> and by identifying African values and customs as sources of inspiration alongside international law on the rights and welfare of the child.<sup>133</sup>

What these observations demonstrate is the need for concerted efforts which permeate legal, social, economic and political policy and which fully encompass local polities. As noted above, the African Children's Charter provides the general motivation for such an approach but leaves the specifics to local agents and authorities since they are best placed to devise appropriate ways of creating a framework for the new image of childhood. However, within this framework, it is critical that the focus should not be on passing good laws or drafting beautiful policy documents but rather on changing practice and governance within both the family and the state in favour of the African Children's Charter.

## 5 Concluding remarks

This chapter discusses the related concepts of children's rights and childhood. It demonstrates that the concept of childhood is never static but always responds to changing needs, new demands and varying influences. More importantly, the chapter

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<sup>131</sup> D Nelken n 14 above at p 315.

<sup>132</sup> African Children's Charter, preamble, para 6.

<sup>133</sup> African Children's Charter, art 46.

shows that the entitlements that are accorded to children are ultimately a function of the societal understanding of childhood and are therefore responsive to these new needs and demands. Consequently, any framework that purports to protect the rights and welfare of African children must as a matter of necessity comport with African ideas regarding the character of childhood if it is to have any success. This, obviously, is no easy task given the multiplicity of perspectives present on the continent. However, despite this variability, the African Children's Charter sets out an agenda for the realisation of the rights and welfare of the child which seeks to align itself with conceptions of childhood emanating from African communities. By providing only a very general philosophical as well as normative framework for achieving this goal, the Charter prudently leaves the task of formulating specific interventions to local constituencies. Various African polities have already picked up the gauntlet and have embarked on comprehensive legal reform intended to entrench the new image of childhood.

In the next chapter, I attempt to describe and analyse some aspects of this 'new image' of childhood through a consideration of the African Children's Charter's main themes.

## Chapter 6

### Core concepts of the African Children's Charter: Context and contests

#### 1 Introduction

Many African children have to negotiate different social spaces adapting to various roles to suit their situation. Whether they are children living in child-headed households, rural or urban children, or children living with HIV/AIDS; any proposed framework for the promotion and protection of their rights must be flexible enough to take into account and be of relevance to the specific circumstances of each particular child. In this regard, the African Charter on the Rights and Welfare of the Child (the African Children's Charter' or 'the Charter')<sup>1</sup> must be robust enough to provide adequate protection for children situated across all the different cultural milieus that have subscribed to the Charter's normative framework. In other words, the Charter must propound principles which are general enough to address the multiple configurations of meaning and perspectives that are and inform children's rights and which emerge from the situated contexts in which children live.

In this regard, it should be noted that although the rights and duties in the African Children's Charter cover almost every aspect of the child's life, there are four cross-cutting principles that may be thought of as underpinning the entire instrument. These core principles include the rule against discrimination,<sup>2</sup> the 'best interests' rule,<sup>3</sup> the rule promoting the child's survival and development<sup>4</sup> and the rule requiring the child's participation.<sup>5</sup> The African Children's Committee has also identified these principles as constituting the central focus of the rights and duties contained in the

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<sup>1</sup> African Charter on the Rights and Welfare of the Child, adopted July 1990 (entered into force 29 November 1999) OAU Doc.CAB/LEG/24.9/49 (1990).

<sup>2</sup> African Children Charter, art (3).

<sup>3</sup> African Children's Charter, art 4.

<sup>4</sup> African Children's Charter, art 5.

<sup>5</sup> African Children's Charter, arts 4(2) & 7.

Charter and of the reporting system under it.<sup>6</sup> The Committee, therefore, requires that relevant information, including the principal legislative, judicial, judicial and administrative or other measures in force or foreseen; should be provided in respect of the general principles.<sup>7</sup> In addition, states parties are advised to provide relevant information on the impact and application of these principles in relation to the implementation of the other provisions of the Charter.<sup>8</sup> However, the relevance of the general principles transcends their application to the state reporting mechanism. Given their generality and extensive scope, they apply to all considerations relating to the promotion and protection of the rights and welfare of the child and, therefore, serve as ideal starting point for any analysis of the substantive provisions of the Charter as well as the situation of children in different contexts.

Since the core concepts of the African Children's Charter are derivative concepts, inquiries into their development, meaning and scope are more or less settled. Different international tribunals and forums as well as academics have elucidated these principles in various contexts including many directly related to the rights and welfare of the child. There will, therefore, be much less contestation with regard to the meaning, scope and applicability of these principles. However, the case is different when it comes to the operation of these principles at the local level. In this regard, universal norms must be tempered with and operate within the parameters of local observation and custom.<sup>9</sup> Consequently, since children's rights have the greatest impact when applied to children's specific situations; this chapter seeks to provide a

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<sup>6</sup> African Committee of Experts on the Rights and Welfare of the Child, *Guidelines for the initial reports of states parties*, Cmtee/ACRWC/2 II Rev2, available at <[http://www.africa-union.org/child/Guidelines% 20for%20Initial%20reports%20\\_%20English.pdf](http://www.africa-union.org/child/Guidelines%20for%20Initial%20reports%20_%20English.pdf)> (accessed on 22 December 2006). Article 43(1) of the African Children's Charter requires every state party to submit to the Committee reports on the measures that they have adopted which give effect to the Charter. Compare Committee on the Rights of the Child, *General comment no. 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)* CRC/GC/2003/5, para 12 available at <[http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.5.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2003.5.En?OpenDocument)> (accessed on 21 January 2006).

<sup>7</sup> African Children's Committee Guidelines, para 11.

<sup>8</sup> African Children's Committee Guidelines, para 12.

<sup>9</sup> See A Hellum *Women's human rights and legal pluralism in Africa: Mixed norms and infertility management in Zimbabwe* (Oslo, Mond Books: 1999) pp 71-79.

grounded analysis of the anchoring principles of the African Children's Charter in order to examine their cultural legitimacy.

The chapter is divided into four sections, the first of which is this introduction. The second section briefly discusses the relevance of cultural context in the application of legal principles and makes the case for the ethnographic analysis of the general principles. The third section is divided into four subsections each one of which presents an analysis of one of the general principles. Each one of the subsections begins with an introductory textual analysis of the principle followed by a more substantial contextual analysis which highlights the various issues and contests surrounding the application and applicability of the general principles within the context of Ndalama and Magombo village. The final part contains some concluding remarks.

## **2 The general principles and cultural context: The basis for an ethnographic approach**

By taking into account the specificities of children's lives, this analysis reinforces the perspective on the relationship between culture, children's rights and law; and therefore cements an approach to children's rights that avoids the age old dichotomies between human rights universals and cultural absolutes. As has been argued earlier, notions of culture that posit it as bounded and unchanging must be rejected. Instead, we must focus on the multiple configurations of meaning representing 'a network of perspectives',<sup>10</sup> that emerges from the situated contexts in which children and their guardians live. Although bland descriptions of general principles followed by examples of inconsistent practices are vogue (and do catch the imagination, it must be allowed); contextualised introspection into aspects of people's daily routines may yield more practical benefits. In the context of the promotion and protection of the rights and welfare of the child, this type of analysis allows us to not only to investigate how the general principles of the Charter have manifested themselves but also to go further and see how these basic principles structure and effect power

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<sup>10</sup> U Hannerz *Cultural complexity: studies in the social organizations of meaning* (New York: Colombia University Press, 1992) at p 11.

relations between children and their guardians. It helps us see how meanings related to the general principles are constructed and how this raises questions about power and authority to construct meaning whether at the local, national or international level.

However, a grounded approach to the implications and relevance of the general principles raises difficult methodological problems. Such constraints arise in part because of the model of law that informs law at the national as well as international level.<sup>11</sup> This model of law is one which promotes a uniform view of law and its relationship to the state and citizens.<sup>12</sup> It establishes boundaries between the legal and social domains and the rules associated with them. These domains exist in a hierarchical relationship so that the legal rules are not only set apart from, but acquire greater authority and precedence over social rules<sup>13</sup> and are used to determine outcomes when conflict arises.<sup>14</sup> Consequently, the law is removed from the domain of social life and posited as an autonomous field with immunity from the kind of considerations that permeate every day existence.<sup>15</sup>

In many non-legal contexts, social diversity and its accompanying multiple loci of human interaction are taken as self-evident. Economists, political scientists, sociologists and anthropologists have no difficulty in imagining plurality and interrelatedness.<sup>16</sup> Legal academy, however, does not respond very well to muddled waters. In this regard, legal theory is more often than not committed to the systematic singularity and coherence of law. In reality, however, life offers a multiplicity of legal orders.<sup>17</sup> Different social milieus give individuals the occasion to create and negotiate

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<sup>11</sup> A Griffiths 'Gendering culture: Towards a plural perspective on Kwenya women's rights' in Jane K. Cowan, Marie-Benedicte Dembour and Richard A. Wilson (eds) *Culture and rights: anthropological perspectives* (Cambridge: Cambridge University Press, 2001) p 102 at p 103.

<sup>12</sup> J Griffiths 'What is legal pluralism?' 1986 *Journal of Legal Pluralism* p 1 at p 3.

<sup>13</sup> SA Roberts *Order and dispute* (New York: St Martin's Press, 1979) p 29.

<sup>14</sup> JL Comaroff & SA Roberts *Rules and processes: The cultural logic of dispute in an African context* (Chicago: University of Chicago Press, 1981) p 5.

<sup>15</sup> A Griffiths n 11 above at p 104.

<sup>16</sup> See generally RA MacDonald 'Metaphors of multiplicity: Civil society, regimes and legal pluralism' (1998) 15 *Arizona Journal of International and Comparative Law* p 69.

<sup>17</sup> BZ Tamanaha 'An analytical map of social scientific approaches to the concept of law' (1995) 15 *Oxford Journal of Legal Studies* pp 501-535.

their own normative standards to shape and symbolise social behaviour and their own social institutions to reinforce or apply these standards.<sup>18</sup> Thus, social and legal regimes are constituted by a plurality of decision-making institutions, distributive criteria and cultural traditions. State initiated law, including international law, can only be mediated through this thicket of institutions and criteria. It does not operate as an exogenous variable upon a zombie-like society; influencing behaviour by offers of rewards for compliance and threats of punishment for non-compliance. Legal systems and social systems are in constant interaction, mutually influencing the emergence of each others rules, processes and institutions. These structures of interaction are often varied and unpredictable. Consequently, to understand the role that state-initiated law plays in a given social field, it is necessary to understand the character and operation of multiple interests and interaction within the social field.

Thus, explicitly announced legal rules such as the general principles of the African Children's Charter are not the only vehicles of normativity; these legislative artefacts complement a variety of indigenous and customary rules and practices through which they find expression. Consequently, normativity cannot be confined to the four corners of legal fiat such as children's rights legislation or the four walls of a justice-dispensing office such as a court, but instead reveals itself in patterns of deference and contestation to claims of entitlement. Processes of human interaction, of which law is part, are infinitely more varied than those suggested by a picture of law that gives priority to legislatively announced claims of right and judicial adjudication of those rights. Children's rights, and in particular, the general principles of the African Children's Charter are but facets of human interaction occurring in families, communities, workplaces, neighbourhoods, bureaucratic organisations, commercial enterprises and an array of other locations of human interaction.

Viewed in this manner, it is clear that the general principles may be viewed not as law *simpliciter*, but also as a species of cultural practice. Describing children's rights as cultural practice entails the positioning of the child at the centre of legal discourse. It entails the recognition of shared patterns of interaction, processes of change, internal

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<sup>18</sup> See generally GR Woodman 'Legal pluralism and the search for justice' (1996) 40 *Journal of African Law* p 152.



inconsistencies, conflict and contradiction. It calls for a view of children's rights as essentially porous multi-polar regime constituting an array of intersections where distinct processes crisscross and are coloured by cultural context.

In order to achieve this rendering of children's rights, it is important to formulate a dialogue that is capable of accommodating the diversity of children's situations whilst at the same time emphasising their shared experiences. Whilst elucidating the meaning and scope of the core principles of the African Children's Charter is an appropriate starting point, the process needs to be complemented with a form of knowledge that goes beyond abstract propositions that are constitutive of children's rights norms at international law; a form of knowledge that is grounded in the specific contexts of children's lives. To acquire such knowledge, concrete data from the lived reality of children's situations is required. Such endeavours afford a grounded approach to the promotion and protection of the rights and welfare of the child.

In view of the above the following analysis of the African Children's Charter departs from orthodox legal analysis and attempts to present a picture of the general principles in action in the lives of the children and adults of Magombo and Ndalama village. It cannot be claimed that the picture presented is comprehensive but nonetheless it does raise significant issues that inform discourse when it is brought from the 'global to the local.'

### **3 Non-discrimination: Concepts, context and contests**

Article 3 of the African Children's Charter purports to extend all the rights set forth in the instrument to each individual child. It stipulates that:

Every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child's or his or her parents' or legal guardians race, ethnic group, colour, sex, language, relation, political or other opinion, national or social origin, fortune, birth or other status.

Article 3 applies to *every* child and is applicable with reference to *all* the rights and freedoms guaranteed by the African Children's Charter. In other words, it is a non-

autonomous provision of the Charter.<sup>19</sup> It may, therefore, only be invoked in relation to the implementation of a right protected by the Charter itself. It has no independent existence, yet it qualifies all of the other substantive provisions as if it were a part of each one. Thus, it governs all of the rights and freedoms recognised and guaranteed in the Charter hence its status as a general principle.

However, although it is relatively easy to delineate the meaning and scope of the non-discrimination clause of the Charter, conceptualising child discrimination within Lomwe social space is not an easy task. This is because the cultural construction of the child is synonymous with the idea of *mphatso* or gift. Irrespective of the circumstances of the child's birth or position of his family in society, he or she is regarded as *mphatso*. According to Lomwe cosmology, *mphatso* must be treated with the utmost care and should not be abused lest the spirit of the giver is offended and causes ruin. In the case of the child, the giver is no less than *chisumphu* or God himself. All Lomwe know that when *chisumphu* is not pleased, his anger has devastating consequences. Consequently, no parent or guardian would own up to treating any child under his or her care in a discriminatory fashion.

The situation is compounded even more because the word that expresses discrimination amongst the Lomwe is *kusankha*. Used in this context, it always carries a negative connotation. Thus, according to Lomwe custom *kusankha* of any type is wrong. According to Village head Ndalama, any one who perpetrates *kusankha*, whether at home or at the work place, is essentially provoking the displeasure of the spirits. He highlights the importance of the sanction against *kusankha* by recalling the case of a village head before him who was partial in a case relating to the allocation of land:

One of my predecessors took some land away from the Mwiheya family and gave it to a gentleman who was working at the tea estate. The chief justified the decision by saying the land had been idle for some time...But it was said that he had been paid some money beforehand. He did not last long after that. Some people say that the Mwiheya's 'organised' him but I think he courted bad luck by accepting bribes.

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<sup>19</sup> On the concept of non-autonomous provisions, see AF Bayefsky 'The principle of equality or non-discrimination in international law' (1990) 11 *Human Rights Journal* p1 at pp 3-4.

Gogo Nachuma from Ndalama village also testifies to the connection between discriminatory behaviour and ill-luck:

Those that practice discrimination are asking for problems. One year, it may be that their crops fail and the following year, they struggle with unexplained illnesses in the home. The problem is that we all forget too soon and we are unable to connect our treatment of others to our misfortunes.

It is, therefore, clear that *kusankha* is roundly condemned within Lomwe cultural space. Consequently, in order to investigate more thoroughly the conception and incidence of discrimination as it relates to children; it is important to adopt terms of discourse that do not put the matter beyond discussion as is the case with the concept of *kusankha*. It is in view of this that different terminology was used in order to fully investigate the conception and incidence of discrimination. The term that was adopted is *kusiyantsa*. The English equivalent of *kusiyantsa* is differentiation. Although used in the context of discrimination, it is less value-laden than *kusankha* and, therefore, does not immediately invite a reproachful finger. *Kusiyantsa* may sometimes be justified, and often is, and therefore does not convey the negative connotations associated with *kusankha*. Thus, after encountering the almost unanimous opinion regarding *kusankha* and the limited possibilities it presented during the early stages of the fieldwork, I subsequently employed the concept of *kusiyantsa* to inquire into various aspects relating to discrimination in the context of children.

As I have explained above, any type of *kusankha*, including that visited upon children is frowned upon and all sorts of misfortune predicted to afflict the perpetrator. However, although *kusankha* is described as culturally unacceptable, it does not mean that discrimination against children is non-existent. My conversations with different children as well as parents and guardians revealed the existence of discriminatory practices on various grounds. For example, participants pointed out instances of discrimination predicated on the grounds of poverty, disability, age, sex and gender. Amongst all these, the most identified ground was discrimination on the ground of sex and gender. However, regardless of the nature or basis of the discrimination, it is clear that its impact on children is significant. A conversation that I had with Patrick, a

seven year old from Magombo village reveals the profound effect that a single act of *kusiyanitsa* had on him:

Question: Why do you like going to school.

Patrick: I like going to school but I am not happy to go.

Question: Why are you unhappy to go?

Patrick: Sometimes when you go and you sit in class, there are people who call out to the teacher and tell him: 'We do not want to sit near him'

Question: Why don't they want to sit near you?

Patrick: They say: 'You are very dirty. You smell foul.'

Question: So what does the teacher do?

Patrick: He tells me to go home and wash my uniform. But my mother has no soap so I just wait for break time and then I can play football with my friends from standard 3A.

Question: Have you told the teacher that you are not able to wash your uniform because you have no soap?

Patrick: I have told him on many occasions. Sometimes I just wish my mother had the soap so I could sit and no one called out to the teacher.

There were other cases where boys and girls were turned away from school because their parents could not afford to buy uniform even though I was informed that the government had issued a directive instructing teachers not to turn back students due to inability to purchase uniform. In all these cases, there was a consensus that the lack of economic capacity should not have been used as a ground for *kusiyanitsa*.

Whereas discrimination within institutional settings such as school or the local hospital is easily identifiable and relatively easy to tackle, such is not the case with discrimination that takes place within the family. This is because questioning discriminatory practices is labelled as insubordination and may lead to curtailment of other avenues of support. In this context, the most prevalent example of discrimination reveals itself in the form of practices that encourage the practice of son-preference and the subordination of girl-children. Son-preference is a form of sex or gender based discrimination that reveals itself through a host of socio-cultural and religious attitudes perpetuating the supposed superiority of the male child whilst consigning his sisters to disadvantage. For example, when Mercy Kanama and her brother, from Ndalama village, were selected to pursue secondary education at Mpinji Community Day Secondary School in Ndalama village, it presented a financial

problem to their father. The father subsequently resolved the situation by paying school fees for Mercy's brother and ordering Mercy to drop out of school. The following year another brother was selected to a different secondary school outside Ndalama village and her father was able to put money together for his school fees. When I asked Mercy's mother about the *kusiyanitsa* between Mercy and her brothers, she said:

We are all brought up differently. Sometimes it's just that the person is not kind hearted...But it is also true that some people believe that girl-children will not be helpful in future. So, to them, I say to them, it makes sense not to spend money on their daughters.

It is instructive that during our conversation, reference to Mercy's father was sanitised and relegated to an allusion to *munthuyo* or *anthu ena*: 'the person' or 'some people', terms which are befitting of references to strangers. It is this aspect of intra-family alienation that makes it difficult to tackle *kusiyanitsa* within the family. The wrongs of family members holding power are 'othered' in a way that not only limits avenues for redress but provides a fertile environment for sustaining a discriminatory attitude.

Thus, it is clear from the foregoing that despite an underlying belief that *kusankha* or discrimination is essentially inconsistent with Lomwe cultural practices and beliefs; there still persist practices that go against this sanction. It is, therefore, crucial to go beyond the conception of discrimination and unpack the socio-cultural basis of the practices and discover why they still occur. In this regard, it is important to point out there are two opposing viewpoints that inform attitudes relating to discriminatory practices relating to children. On one hand, there are arguments to the effect that some forms of *kusiyanitsa* are acceptable whilst on the other; there is the view that any form of *kusiyanitsa* that results in unfairness is unacceptable. Although the former view had comparatively fewer proponents than the latter, its existence justifies serious consideration. Consequently, in the subsequent two sections, I examine the issue of *kusiyanitsa* along these two paradigms.

### 3.1 Maybe not good but justifiable: Analysing the pro-distinction narratives

Since each act of discrimination takes place in a particular social context and is governed by certain defined social parameters, it is difficult to outline a general justification or motivation for all acts. Consequently, what is attempted here is an analysis of some of the arguments that were advanced for specific acts of discrimination suffered by children and to investigate whether a unifying theme may be tagged onto these narratives.

As has been explained above, *kusankha* automatically has negative connotations. Consequently, instances of discriminatory practice veiled as mere *kusiyanitsa* usually carry with them some form of justification.

One of the most common justificatory explanations was economic incapacity. In this regard, it is suggested that when parents or guardians find themselves in difficult economic circumstances; they are sometimes forced to make choices that may adversely affect the rights and welfare of some of the children under their care. The intention is not to treat the children differently but that the situation merely forces their hand. A conversation I had with John Mthawira, a tyre smith at Thyolo District Market, highlights this type of justification. He explained how his eldest child, Timothy, dropped out of school ended up working with him at the tyre repair stall whilst his younger son, Tamando, continued with schooling:

When Tamando was selected to go to secondary school, his brother had just finished his Form Two<sup>20</sup> and was supposed to start the next class. I could not afford to pay fees for the both of them. I, therefore, decided that since Timothy had already accomplished a bit of secondary education, his brother should also have a taste.

While there is some tragic logic to cases like that of the Mthawiras, this must be contrasted with cases like Mercy Kanama's situation. It is revealing that her father was able to put together funds for her younger brother a year after she had been selected to go to secondary school, yet he could not bother to do the same for her.

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<sup>20</sup> Form Two is the second year of secondary school and the tenth year of a child's progressive education.

Thus, in the case of other vulnerable children such as orphans or girl-children, the choice may be more economic than appears at first sight. In the past, it was attractive to bring orphaned children under one's care since it guaranteed steady labour within the household and economic security in old age. However, changes in the modes of production from subsistence farming to a cash-based economy as well as the general mobility of rural populations has put a strain on the children's duty to help parents. Whereas a lot of elders put a lot of stress on this duty, it is becoming more and more recognised that its conceptualisation is changing from that of a duty to that of mere goodwill. Consequently, care for orphans, and in some cases, girl-children is considered by some parents and guardians as a thankless task without any discernible benefit. Mai Nahipa, a community social worker who runs children's rights awareness courses as well as manages an orphanage in Ndalama village, explained the incidence of orphans in Magombo and Ndalama village in the following terms:

Ten years ago...maybe fifteen years ago, there were no orphans in this village. It does not mean that parents were not dying. They were dying. However, taking on the responsibility for such children brought you honour and maybe wealth later on...

Nowadays, if you start bothering with orphans, it just brings you poverty so people see no point in it. Even when the children are their brother's or sister'. All the children that you see here, perhaps except for one or two, have got uncles, aunts and grandparents in this village. But did they take them?

Village head Magombo shares similar sentiments. He points out that under Lomwe custom there is a general duty to help out your kin when they are in problems. However, he seems to endorse the poverty plea when he rhetorically asks: 'How can you enjoy sugarcane when you have no teeth?'

Another ground for *kusiyantsa* is the sanitisation of difference and with it the normalisation of practices that perpetuate unjustifiable *kusiyantsa*. A consideration of a series of folk sayings or proverbs reveals this aspect. For example, proverbs such as *mwana wa mwini n'gaga, saundika* [Your friend's or neighbours child is like *nsima*<sup>21</sup> of maize husks, it cannot be moulded]; *kwa eni kulibe mkuwe, mutu wa*

<sup>21</sup> *Nsima* is the daily food of the majority of Malawians. It may be described as hard porridge. It is usually made from maize flour whose husks have been removed. However, when times are hard, the husks, which are usually fed to animals are also milled into flour and consumed by

*nkhuku n'chiwalo* [When amongst strangers one does not shout, the head of a chicken is a proper chicken piece]; *ukadya kumadziwa kuti azungu ndi alendo* [While you are eating remember that Europeans are strangers]; and *mbalame ya kwao siiwala* [a bird with a home does not forget such home] indicate that *kusiyanitsa* towards others who are not members of your immediate family is tolerable. Although this sort of attitude stands in stark contrast with the *kuthandizana* or 'help thy neighbour' ethos that is claimed to permeate Lomwe society, it is a rather candid reminder of the socio-economic changes that have upturned the values and priorities within families.

Furthermore, some elements of Lomwe cosmology also seem to approbate discriminatory actions against children. Lomwe people believe that the universe is finally balanced and that for any act of goodwill that one takes upon himself; in time, he or she will have a favour bestowed upon him or her. The antithesis of this belief is also held to be true and is expressed in the proverb *choyipa chitsata mwini* [Evil follows the wrongdoer]. However, the problem with the operation of this concept is that it may not be the perpetrator himself or herself who pays the tariff but even other members of his family including children. Although only two individuals expressed views connecting child discrimination and the inevitable operation of the Fates, the belief in the proposition that *choyipa chitsata mwini* is significant with fifty six percent of all adults and thirty six percent of all children interviewed expressing belief in it. Thus, although some may plead poverty in justifying *kusiyanitsa*, it may be that belief in the fairness of the Fates that actually informs the decision-making process. This type of world view puts children who are already at risk such as orphans or those affected by HIV-AIDS at a disadvantage by exposing them to discriminatory practices.

Whereas poverty and supernatural intervention have been advanced as explanations for various instances of differential treatment of children, the most identified justification and also the basis for the most pervasive type of discrimination, is difference. The resilience of sex and gender based discrimination lies in the assumed obviousness of difference between boy-children and girl-children. Although belief in the logic of difference holds sway amongst many older parents and guardians, the



belief is not absent amongst younger parents either. One of the latter, Mai Anne Wyson from Magombo village, points out why differential treatment occurs:

Boys are stronger and most of the times they are more intelligent and help their parents more than the girls...If you asked any woman in this village, they would say they prefer to have a son. Sons help more.

Mr Davison Wyson concurs with his wife. However, his explanation is more philosophical. He argues that *chisumphi* or god made man stronger because he is the one with the duty to look after the family. Parents must, therefore, ensure that boy-children grow up to take up this responsibility. This, he points out, is something no one who is in his right frame of mind can argue against. Consequently, acting to change the way things are entails going against the logic of difference. Such endeavours are not always met with friendly accommodation. Mai Malindira frowns upon efforts that seek to renegotiate the position of women and girl-children within the family home. She reckons that such activities only serve to disturb family harmony and bring confusion:

We just look at all these women running about, talking about 'jenda'.<sup>22</sup> Yet, when their husbands beat them like *tchopa*<sup>23</sup> drum, they run to *ankhoswe*.<sup>24</sup> If our way of life was so bad, why then go to the *ankhoswe*?

...If the women of this village stuck to looking after their husbands as they ought to, and minding the kitchen as a good woman should; then their husbands wouldn't be spending their money at the beer hall at the Boma and on the prostitutes in Ndalama village.

The benefits of keeping to one's position within the family are, therefore, obvious and submission to patriarchy is equated with good behaviour. Socialisation tends to reinforce the inferior status of girl-children. The repetitive nature of the message only serves to clothe the association of female-hood and inferiority with an aura of truth. A

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<sup>22</sup> *Jenda* is the vernacularised equivalent of gender equality and women's rights but it is also used in some contexts to refer to human rights generally.

<sup>23</sup> *Tchopa* is a type of dance much loved by the Lomwe.

<sup>24</sup> *Ankhoswe* are traditional marriage counsellors.

conversation between two members of the focus group from Thyolo Secondary School serves to put the matter into perspective:

Alexie Tambula: We boys are presidents.

Tiyamike Mayuni: Do you believe that? We can also be presidents. Or prime ministers.

Alexie Tambula: Name the last president of Malawi who was a woman... Women can be presidents but only incompetent ones.

My interaction with this group of students from Thyolo Secondary School revealed the depth of the belief that girls were somehow inferior and, therefore, could not achieve as much as boys did. Whereas the boys sometimes made statements supportive of non-discrimination, further interaction revealed that at least for some, this was out of mere political correctness rather than a conviction that discrimination on the basis of sex or gender was wrong. At least three of the boys in the focus group made mention of a favourite anti-*jenda* slogan: *Mkazi sangakumbe manda* [A woman cannot dig a grave] to demonstrate the obviousness of difference between boys and girls.

However, sex based discrimination does not only have an impact with regard to the allocation of gendered roles but also has a devastating impact on the life chances that accrue to girl children. For example, some of the girls from the focus group related that a number of female students had been 'advised' not to take design and metalwork on their list of optional subjects. They were instead advised to take home economics. Although some of the girls would have liked to pursue metalwork, they took the advice without questioning the teachers in charge of the class regarding the logic behind such advice. For example, Sitinga Mulera, who rates herself as being strong at mathematics, feels that the criteria for selection should have been academic rather than a choice between boys and girls but could not bring herself to confront the teacher:

The teachers expect us to be polite, especially the girls. Consequently, if one confronts a teacher, then they are deemed to be disrespectful and may be given a difficult time by teachers.

Thus, the ethic of respect serves to prevent girls from making claims against discriminatory behaviour. Silence guarantees peaceful relationships, whether it is within the family context or in relation to other social arrangements such as school or church. Furthermore, since respect is bandied about as an important aspect of virtue, submissiveness from the female folk is almost guaranteed. By contrast, boys are socialised to make their claims heard, not surreptitiously but loudly and aggressively in a manner befitting of 'presidents'.

Yet, whether the basis of the discriminatory act lies in the poverty of money or the poverty of the mind; the very fact of it taking place reveals a belief that one particular child is worth less than another; that that particular child is not deserving of equal concern.<sup>25</sup> It is a kind of conviction that is difficult to reconcile with the Lomwe conception of children and childhood. However, this is not an attitude that is without challenge. Many parents, guardians and children believe that any form of *kusiyanyitsa* that is based on unfairness is inherently wrong and far from being a reflection of Lomwe culture and custom, it is in fact evidence of its breakdown. In the following section, I briefly outline the basis and strength of views supportive of non-discrimination.

### **3.2 It is not part of our culture: An inquiry into non-discrimination discourse**

One notable aspect relating to narratives that support non-discrimination perspectives is that they are not only based on children's rights discourse but also on an eclectic mix of cultural, religious and spiritual arguments. Consequently, non-discrimination perspectives are not the preserve of '*ajenda*' or human rights advocates alone but also that of ordinary people who claim no special knowledge of children's rights.

One such ordinary person is Mai Nkhululu who lives in Magombo village. Mai Nkhululu is in her late forties and has four children, the youngest of whom is seventeen years old. Recalling her experience as to the manner in which she brought up her daughter and three sons, she says:

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<sup>25</sup> Compare the views of Langa DCJ in *Bhe v Magistrate, Khayelitsha and others*, CCT 49/03 (South Africa) paras 54 - 59.

One really does not have a choice as to the kind of children one will have. God gives you a son, you say thank you. You also say thank you if he gives you a daughter...  
 ...[O]ur culture says that children are gifts. Boys and girls, all are gifts. That is how it is. So you care for them in the same way. Whether it is food, clothes or chores around the house.

The equal treatment of children that Mai Nkhululu refers to is at the core of attitudes that do not condone child discrimination. Such a perspective is very much interconnected with the conception of children as gifts. It is a logical extension to a cultural worldview that posits children as special and worthy of equal protection and affection. Mai Nkhululu's views are shared by her neighbour, Mai Sambalikagwa. She argues that subjecting children to discriminatory practice is inherently wrong because it amounts to cruelty [*nkhanza*] and any cruelty goes against the fundamentals of Lomwe culture and the requirements of good parenting.

Village head Ndalama supports the view that discriminatory practices against children are not sanctioned under custom. He argues that no person who practices discrimination can really point to Lomwe custom as a basis for such behaviour. He further points out that under custom, a child always has a claim if he or she is being discriminated against by other members of the family because unfair differential treatment constitutes abuse [*kuzunza*].

Pragmatism is another reason that sustains non-discrimination perspectives. For example, in families where all the children are of the same sex, it is difficult to sustain gendered roles in the allocation of family responsibilities. In these families, the allocation of resources and affection does not follow the patriarchal patterns that serve to promote son-preference. One of my key participants, Yaya,<sup>26</sup> who always insisted that I bring a bottle of Fanta for our conversations (on the grounds that my endless questions 'stole' her voice), had the 'misfortune' as she called it, of having seven sons.

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<sup>26</sup> Yaya is a term of endearment for a grandmother (perhaps corresponding to nan in the English language). I visited Yaya on several occasions but she never told me her name, insisting that Yaya was sufficient.

Yet, she did not treat them as ‘presidents’ but rather inculcated in them a sense of responsibility both at home and outside it. She had to:

... [T]each them to pound maize, wash plates and clean the house. I would even send them to the maize mill and to draw water. If I had listened to suggestions that boys should not be given girls jobs, I would not be walking now. My back would have been broken by now. But as you can see, I can walk.

Furthermore, changes to the modes of production as typified by the shift from subsistence agriculture to a cash economy have exploded the belief that only male children will acquire the capacity to help their families. Since access to cash is now determined by the extent of schooling that one undertakes, it is becoming more and more recognised that the more opportunities that are given to *all* children within the family, the more extensive the network of resources that the parents or guardians will have access to in old age. Consequently, it serves the parents and guardians interests not to discriminate against any children that are under their care. According to Mai Sambalikagwa:

There is an expectation that male children will look after parents but this depends on individual children. If a child loves you enough, he or she will remember that I left my mother in the village and he or she will remember to say thank you...

In my experience it is the girls who remember to help. The boys are often busy with their wives and the drink. So if you had treated your girl poorly, you would have no one to support you.

Thus, it is clear from the foregoing that an intention to inculcate an obligation to provide assistance motivates some parents to respect non-discrimination principles.

Yet another source of motivation is religious or spiritual conviction. Although most of the Lomwe profess some form of religious faith and are members of one of the various Christian denominations or Islamic sects operating in Thyolo District, they are also a deeply spiritual people. Consequently, the worship of the Biblical and Koranic God is undertaken alongside observation and ceremony honouring the spirits of the

ancestors. Integral to these religious and spiritual activities is the adherence to various moral codes that demand treating fellow human beings with kindness and fairness.

As was explained above, the Lomwe believe in the principle that misfortune follows the evil-doer. In this regard, discriminatory behaviour is conceptualised as unfair or evil whilst demonstrating non-discrimination ensures that one will be in good stead with *chisumphu* or god.

The above observations mirror beliefs held by Christians. Such beliefs are often expressed in the concept of brotherly love. My conversation with Patrick reveals the depth of belief in these principles:

Patrick: It is not good to chase our friends from class because their uniform is dirty.

Question: Why is it wrong?

Patrick: Because the Lord said we should love one another.

Question: So do you do that?

Patrick: Yes.

Patrick: Even when they are not nice to you?

Patrick: [affirmative nod]

Belief in biblical and Koranic doctrine is not restricted to children but also holds sway amongst adults many of whom equate a non-discriminatory attitude towards others including children with the qualities of a pious Christian or Moslem. It is clear, therefore, that adherence to religious or spiritual moral codes is a strong foundation for the cultivation of a non-discrimination ethos amongst the Lomwe...

Another basis for non-discrimination perspectives is the knowledge of children's rights principles, and in particular, of provisions proscribing discrimination against children. In this regard, it is noteworthy that the majority of the young participants knew and could recite a significant number of the principles that are contained in the African Children's Charter. This is because children's rights are taught (if not always followed) as part of the social studies course both in primary as well as secondary school. Parents, guardians and children who do not attend school have also gained knowledge relating to the rights and welfare of the child through the activities of the Mai Nahipa and Ulendo Arts Theatre who usually hold discussion groups,

performances and recitals at the court of Village Head Ndalama. The radio has also proved very informative in relaying children's rights messages. Thus, through these various means, a significant number of children as well as their parents and guardians have come to know of the non-discrimination principle as part of the law of the land that governs relationships between children and their guardians.

It is clear from the foregoing that the principle of non-discrimination has a place within Lomwe cultural space. However, it is also apparent that its legitimacy remains contested. It is in the interests of children's rights practitioners to maintain this contestability because this presents an opportunity for challenging attitudes that encourage discrimination against children. The many bases of perspectives that support non-discrimination present opportunities for tackling inconsistent practices.

#### **4 Best interests: tracing the contours of a shadow-less concept**

Article 4 of the African Children's Charter enshrines what is commonly known as the welfare or best interests principle. It provides that:

In all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration.'

The best interests principle appears in a variety of contexts throughout the Charter. In particular, it is used in relation to the child's freedom of thought, conscience and religion,<sup>27</sup> with reference to the child's right to the enjoyment of parental care and protection,<sup>28</sup> in relation to the parental responsibility for the upbringing of the child,<sup>29</sup> in relation to the system of adoption or similar practices,<sup>30</sup> and in relation to measures pursued in the case of children who are permanently or temporarily deprived of their family environment.<sup>31</sup>

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<sup>27</sup> African Children's Charter, art 9.

<sup>28</sup> African Children's Charter, art 19.

<sup>29</sup> African Children's Charter, art 20.

<sup>30</sup> African Children's Charter, art 24.

<sup>31</sup> African Children's Charter, art 25.

However, it is the use of the principle in article 4 which is the focus of the present analysis. The provision is applicable in *all* actions concerning children. It is for this reason that it will be invoked in conjunction with the other provisions of the African Children's Charter in order to support, justify or clarify a particular approach to issues arising under the Charter. Indeed, there is no provision in the African Children's Charter and no right or freedom recognised therein, with respect to which the principle is not relevant.

However, although the best interests principle has been a feature of legal development for the past two hundred years, the term 'the best interests of the child' is a rather nebulous and ill-defined standard that opens a plethora of considerations and priorities.<sup>32</sup> There have been many attempts by courts and commentators to attach to that standard some definitive, concrete and objective terms but these attempts have been restricted by the context within which the authors were operating. The imprecision that surrounds the concept of the best interests has led some commentators like Mnookin and Elster to declare that the concept is 'indeterminate' and that working with it is akin to exercising 'Solomonic judgement'.<sup>33</sup>

The indeterminacy charge is not allayed since the principle does not prescribe the range of factors that must be considered in determining what is in a child's best interests. However, in response to this charge, it is clear that it would not have been possible or practical to have attempted within the space of an international instrument to incorporate an exhaustive list of core factors applicable to all situations. Even if such an exercise were attempted, it would leave unanswered the question as to comparative value which ought to be ascribed to each of the different competing interests.<sup>34</sup>

Another question that relates to the meaning of the best interests principle relates to

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<sup>32</sup> MK Pruett, K Hogan-Bruen & T Jackson 'The best interest of the child: Parents' versus attorneys' perspectives' (2000) 33 *Journal of Divorce and Remarriage* p 47 at pp 48-49.

<sup>33</sup> RH Mnookin 'Child custody adjudication: Judicial functions in the face of indeterminacy' (1975) 39 *Law and Contemporary Problems* p 226.

<sup>34</sup> G Van Bueren *International law on the rights of the child* (Amsterdam: Kluwer Law Publishing, 1995) p 47.



the weight that the principle must be given. In this regard, the African Children's Charter stipulates that 'the best interests of the child shall be *the* primary consideration.' This contrasts sharply with the manner in which the principle is couched in the CRC whereby the best interests of the child are only *a* primary consideration. Thus, the African Children's Charter provision adopts more onerous wording. The term 'the' implies that the child's best interests should be considered the overriding factor, trumping other considerations which may compete for primacy. This is unlike where the term 'a' is employed whereby the implication is that apart from the best interests of the child, there are a number of other factors that may also be considered as being a primary concern. With regard to the use of the article 'a' in the CRC formulation of the best interests principle, Van Bueren notes that such a formulation may allow states parties to balance the best interests of the child against other equally weighty primary considerations of the state parties' choosing, such as religious laws or economic considerations.<sup>35</sup> Van Bueren's concerns are not without foundation and are borne out by a consideration of some of the reservations to CRC which clearly put religious, cultural or traditional considerations above the best interests of the child. Consequently, it is submitted that the African Children's Charter formulation somewhat mitigates this risk by providing for a stronger status for the best interests principle. Further to this, the Charter's approach is buttressed by the fact that article 4(1) denotes the principle as the primary consideration. By describing it as primary, the African Children's Charter clearly indicates that the principle is of first rank and that any other considerations that are competing against it should be regarded as secondary, or at least not having the same paramountcy as the best interests principle.

Article 4(1) provides that the best interests principle shall be treated as the primary consideration 'in *all* actions concerning the child undertaken by any person or authority'. This phrase provides significant guidance as to what constitutes the scope of the provision. The reference to 'all actions concerning children' emphasises the fact the principle is meant to be applied widely. In fact, it must be applied in every case where the rights and welfare of the child are under consideration.

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As above at p 46.

However, unlike a consideration of the scope of the phrase 'all actions', the limits of the term 'concerning' are difficult to demarcate. What level of impact on children is required before an action may be said to concern them? Must an action directly impact on a child for it to concern him or her such as, for example, decisions in a custody hearing or matters relating to initiation rites? Or is it sufficient if the action has some relevance to children such as increases in income tax levels or the redrawing of education policies? There are no obvious answers to these questions. However, it may be argued that given the intention to apply the principle widely, as suggested by the reference to 'all actions', the term 'concerning' should be construed as widely as possible as well so that the spirit of the provision is not stifled.

In determining who must apply the principle, the phrase 'in all actions' again provides significant guidance. It indicates that any person considering any matter concerning children should have regard to that child's best interests. This rendering of the provision is confirmed by the reference to 'any person or authority' later in article 4(1). This formulation should be contrasted with the manner in which article 3(1) of the CRC limits the application of the principle to 'public or private welfare institutions, courts of law, administrative authorities or legislative bodies.' In other words, article 3(1) of the CRC excludes some domains such as the family, for example, from the reach of the best interests principle. In this regard, it is therefore submitted that the African Children's Charter provides better protection to children since it captures the actions of any person or authority without making any distinction. In other words, the best interests principle must be applied in all actions concerning children regardless of whether those actions are undertaken by private or public entities.

Despite the existence of certain fundamental problems relating to its manner of application, the preceding analysis clearly demonstrates that the best interests principle plays a central role in the application of the provisions contained in the African Children's Charter. If the Charter is to have any impact at all in the lives of African children, it is crucial that the principle should enjoy the same centrality in their day to day lives. In the following section, I outline the status of best interests principle in the lives of children in Magombo and Ndalama village.

#### 4.1 Lost in translation? Conceptualising best interests

Although the meaning and exact scope of the best interests principle are contested, amongst children's rights practitioners, judicial officers and social welfare officers, the concept remains a term of art. However, a consideration of the principle within the Lomwe social context brings to the fore the difficulties which the preceding analysis highlighted. Chief amongst these difficulties is the conceptualisation of the principle in terms that accord it the same level of importance as is the case at international law. Fashioning a translation that effectively communicates the essence of the principle is a challenging if not impossible task. In this regard, it is worth noting that the Chichewa version of the CRC omits the principle in its entirety.<sup>36</sup> Consequently, during the early stages of the fieldwork, I employed the phrase *kuyika ana patsogolo* whose literal meaning is 'putting children first'. However, my conversations with Mai Nahipa, the children's rights specialist from Magombo village, revealed that my translation did not adequately cover the scope of the best interests principle. Her principle concern was that my translation did not sufficiently reflect the idea that the principle applied 'to all actions concerning children'. She, therefore, suggested that I adopt the phrase *kuyika zofunikira za ana patsogolo pa nkhani zonse zomwe zikuwakhudza* [putting the needs of children first in all matters that concern them]. Yet, despite expressing the best interests principle more clearly, the phrase is difficult to work around with and proved problematic to introduce during normal conversation. I, therefore, reverted to *kuyika ana patsogolo* because of the idea of paramountcy that that phrase engendered.

Mai Nahipa further pointed out that although during her training as a children's rights facilitator within the two villages, the best interests principle was highlighted as forming the backbone of children's rights discourse, the principle was absent from the *Chichewa*-based materials that she was given to use in her advocacy work. She is the person who first alerted me about the absence of the principle in the *Chichewa* version of the CRC.

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<sup>36</sup> See UNICEF *Mgwirizano wa malamulo pa ufulu wachibadwidwe wa mwana* (Limbe: Montfort Press, no date).

My conversations with primary and secondary school students also revealed a lack of knowledge relating to this most famous of children's rights principles. Although students had been taught many aspects of children's rights and could recite the various rights with ease, the best interests principle remained unknown.

Yet, Mai Nahipa points out that although there are problems in emphasising the principle in the same terms as is the case under the African Children's Charter, this factor alone does not water down the importance of the principle or suggest that little could be gained by pursuing efforts aimed at its popularisation. She points out that the best interests is more about *zochitika* ['doing' or 'the real stuff'] and less about *pakamwa* ['the mouth' or 'talking']. She says:

It is difficult to teach others about what the best interests principle is. However, it is not as difficult to demonstrate how the principle should apply in the upbringing of children ...Consider the case of the children that we have at the orphanage. We could easily have left them with their extended families. But doing so would have meant that they would have suffered hardship. They would not have been able to go to school or have enough food and clothes. Although it is always nice to be with one's relatives, it is better for these children to live here with us.

Thus, according to Mai Nahipa, one should worry less about translations and focus more on the real lives of particular children and determine a course of action that best serves their needs. But the question remains: how does one discuss the concept in Lomwe cultural space?

However, it is not just the technical difficulties of translation that make the observation of the best interests principle very complicated. Rather, it is the proposed primacy of the principle and its focus on the individual child's interests that creates problems for there are other interests that compete with and are considered as being more urgent than the child's interests. The general Lomwe worldview focuses on family or community interests rather on the individual. In this regard, it is worth noting that individuals are generally not in a position to claim rights which are separate from and against the family or kinship group of which they are members. Consequently, children do not have special entitlements outside the welfare of the family as a whole. Yaya's views on the primacy of children's rights and interests

captures this conception of entitlements very well:

When one buys clothes or food for the children, he or she just buys. One does not stop to consider each child individually. If there is no sugar at home, everyone will not have porridge that morning. If there is money in the home, then everyone will leave the home cheerfully in the morning. But if there is no money, we face it together.

'Facing it together' negates the whole idea of children's best interests being the primary consideration. Since by definition primacy under the African Children's Charter requires that the child's interests take precedence. Yaya's views on the ordering of priorities in the home were echoed by other participants. For example, Mai Namame argues that placing the individual child's as *primary* is akin to *kusankha* (discrimination) between family members, and as was argued earlier, *kusankha* is inherently un-Lomwe. She goes on to question the individual focus of children's rights by making observations on its impact on family unity:

These freedoms that children are said to have nowadays are good but sometimes, they cause problems. The unity and peace that was in the family is now gone and parents have no freedom anymore...According to our culture everyone should be similarly treated. You cannot take one member of the family and give them special treatment. Yet the freedoms which you describe, especially this one of putting children first requires that we should create gaps between each other. This will just lead to quarrelling within the family.

Clearly, then, achieving the acceptance of the best interests principle will not be an easy task. Since the concept is perceived as challenging the very foundation of family relationships which are based on co-existence and the sharing of both the good and the bad. Yet, despite the focus on the family's unity of purpose, the very structure of the family and its decision-making procedures sometimes has the effect of leaving out children with consequences on the quality of their protection. Consequently, in the subsequent analysis, I will examine how these dynamics affect the best interests of the child.

## 4.2 The child's best interests in family decision-making

The structure of Lomwe families has a profound influence on the decision-making process relating to children. In this regard, it should be pointed out that Lomwe families are arranged along matrilineal lines. Consequently, adult males from the maternal family are the most influential persons in the decision-making processes relating to the child. Important issues such as those relating to children's education, choice of marriage partners and career paths are not the preserve of the immediate parents or guardians, let alone the children themselves. Since relationships are constructed along the extended family model, various family units are aggregated together along kinship lines to form clans. This system of integration allows a large number of people to be incorporated into the family circle. The aggregation of persons is also matched by a similar diffusion of duties and rights. This arrangement of family relationships has several implications on the best interests of children.

One such implication is the idea that the child belongs to the family or the kinship group. Consequently, parental rights and authority, these are exercised by a large number of people each one of whom is entitled to make or contribute to decisions relating to the child's best interests. Under this family system, a child has a number of 'fathers' and 'mothers'. For example, all the brothers and male cousins of the biological father are considered the fathers of the child whilst the mother's sisters and female cousins are regarded as mothers. Although, there may be no genetic ties between the child and a particular father or mother, the exercise of parental authority for these social fathers and mothers is real. In other words, in terms of the exercise of parental authority, there are no distinctions between the biological mother and father and those accorded such status through extended kinship relations.

Related to the idea that the child belongs to everyone is the principle that decisions affecting the child cannot be taken by one person even when they are the biological parent or the immediate guardian. There is an expectation by members of the extended family who are entitled to exercise parental rights and duties over that particular child to be consulted in making decisions and choices for that child.

In response to population mobility and changes in settlement patterns, the principle of

dispersed parental authority has not been restricted to clan relations. Due to the migration of individuals from their villages of origin to places far from their local kin, parents and guardians have found the concept useful in relation to neighbours and friends. Consequently, it is not unusual for parents to delegate and for neighbours to assume parental duties and rights. In some cases, neighbours assume such parental rights and duties even in the absence of direct delegation with full confidence that the parents will approve of the decisions they make. In other words, despite changes in settlement arrangements, the principle that the child belongs to the group or community still holds sway. Peter Mukhova, who is now seventeen, gave an account of an incident from his childhood where a neighbour exercised parental rights over him:

I was playing football in the road and there came along a lorry which was carrying bricks. I stepped aside and let it pass then I clambered onto the rear drop-side and hung from the tail end of the vehicle. I enjoyed my ride until the truck got to a steep gradient and slowed down. I climbed down and walked back to my house...Mrs Hara, our neighbour was waiting for me. She gave me the most severe hiding that I had ever received...

I did not tell my mother when she got home because I knew I would just get another dose. But Mrs Hara came home that evening and told her.

The kind of arrangements described above are meant to serve the child's best interests since it ensures that the child has access to constant care and appropriate socialisation as he or she grows up. According to village head Ndalama:

One person cannot raise a child. There will be matters with which one is well conversant but there will also be others in which one's understanding is limited. Being a parent is in many respects like being a chief. I do not know everything, so I have a lot of advisers to assist. Like the chief, parents cannot do everything alone.

However, this type of decision-making process does not always serve the best interests of the child. In the first place, since a large number of persons are entitled to make decisions, conflicting solutions to particular problems may arise and it is not always possible to get decisions made as quickly as possible due to the large number of opinions to be solicited even when the best interests of the child require a quick resolution. One obvious example of the latter are decisions relating to the custody of

orphans. Family procedures usually make the process very drawn out as an aspect of respect to the dead parents, when a quick resolution would be best for the children.

The second implication of the extended family's structure on deciding the child's best interests relates to the manner in which decisions relating to children's issues are made. In this regard, it may be recalled that in Chapter 5, it was argued that a person's status as adult or a child has implications on the entitlements that he or she may claim. In particular, it was demonstrated that the acquisition of voice and authority is directly related to one's position in the family hierarchy. As a result, the nature of the relationship between children and those who exercise parental rights often serves to articulate the views of adults without equal regard to those of children. In particular, the relationship between children and their parents is marked with a certain distance and an air of deference. Indeed, during socialisation the ethos of unquestioned respect towards elders is emphasised. One practical consequence of the ethic of respect is that children do not represent themselves on the family council whose membership is only achieved through the ascription of status related to the achievement of adulthood. The importance of respect is evident from the large number of pulpits from which the message of respect is preached. According to Mercy Kanama:

One has to go along with what father says. If I protest, then that is taken as evidence of disrespect and I may end up losing even more. As a result, I do what I am told even when it makes me unhappy.

The child's duty to respect parents at all times<sup>37</sup> is based on the assumption that parents and guardians always act in the best interests of children. Consequently, the child's contribution to the decision-making process is suppressed. In a nutshell, the quest for a course of action that serves children's interests is conducted in a manner that promotes adults views of what they feel those interests should be. Whilst this style of decision-making is capable of protecting children's interests, less insistence on respect and its association with silence could improve the process.

The third implication of the communal nature of the extended family system relates to the pre-eminence of family interests over all other interests. In the event of

<sup>37</sup> See African Children's Charter, art. 31.



disharmony between the interests of the child and those of the family, custom holds that the latter will trump the former. The principal rationale for this is that the family is regarded as being a protective place for all its members and as such, decisions that promote its welfare as a whole will also automatically protect those of its individual members. Consequently, the idea of an individual child's interests gaining paramountcy does not sit well with this logic of inclusiveness. In the majority of cases, choices that further family interests will also favour the best interests of the child. For example, nowadays it is recognised that in order for a child to effectively execute his or her duty of providing support for the family, he or she must attend school. Consequently, parents and guardians make the effort to ensure that children stay in school. In the result, both the family interests as well as the child's interests are preserved. However, where there is conflict, it is obvious that the child's needs have to be suspended.

In closing this subsection, it is important to note that efforts aimed at securing the child's best interests are bound up with the arrangements surrounding the home, kinship ties and decision-making procedures that inform these relationships. Whereas there is a clear recognition that children's interests are an important issue in the management of the family, the customary processes for mediating those interests tend to serve interests 'larger' than those individual children. In a way, therefore, the practical difficulties in pin pointing where the best interests of children lie within Lomwe cultural space somewhat mirror the philosophical dilemmas that were highlighted at the beginning of this section.

The primacy of family interests is so well entrenched that the idea of the child's individual interests trumping those is pathologised as being akin to discrimination or *kusankha*. Consequently, the popularisation of the best interests principle as a leading child-rearing tool within Lomwe society must be expected to encounter significant resistance.

## **5 Survival and development and the interrelatedness of children's rights**

Article 5(1) of the African Children's Charter provides that every child has an inherent right to life and that this right must be protected by law. Article 5(2)

complements the recognition of this right by obliging states to ensure to the maximum extent possible the survival, protection and development of the child. Since the right to life and the right to survival are essential preconditions to the enjoyment of any of the rights protected in the African Children's Charter; they apply in all considerations relating to the promotion and protection of the rights and welfare of the child. In other words, the right to survival and development is a general principle that serves to reinforce the *raison d'être* of each of the right enshrined in the Charter.

The right to survival and development of the child is a relatively recent addition to international law. It was suggested to the Working Group on the Draft Convention on the Rights of the Child by India during the drafting of the CRC.<sup>38</sup> Although the right to development had been established at international law by the time the Working Group was considering the proposal, the same had not been achieved for a right to survival. The discussions, therefore, focused mainly on the definition of the concepts of survival, right to survival, right to development and the child's development. It was observed life and survival were complementary and were not mutually exclusive. Consequently, the Working Group included alongside the guarantees to a child's right to survival and development, a general right to life. The principle was later to be adopted by the CRC Committee as a general principle of the Convention. The African Children's Charter formulation of the principle closely follows the precedent set by the CRC but additionally makes it clear that the death sentence should not be pronounced against children.

The survival and development principle enunciated in article 5 of the African Children's Charter engenders two separate but closely related concepts, namely; the right to survival and the right to development. The right to survival encapsulates the right to life in both its civil and political as well as its social, economic and cultural aspects. In this regard, states parties are required to adopt appropriate measures aimed

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<sup>38</sup> The original proposal which was submitted to the Working Group for consideration read:

The states parties to the present Convention undertake to create an environment, within their capacities and constitutional processes, which ensures to the extent possible, the survival and healthy development of the child.

See Draft Convention on the Rights of the Child as adopted by the open-ended Working Group on 16 October 1987, E/CN.4/1988/WG.1/WP1.

at increasing life expectancy and lowering infant mortality, as well as instituting prohibitions against the death penalty, extralegal, arbitrary or summary executions, and situations of enforced disappearance. States parties' actions should promote a life of human dignity. In other words, states should fully ensure the right to an adequate standard of living for children including the right to housing, nutrition and the highest attainable standard of health.

The right to survival is a dynamic concept and incorporates all the necessary steps that a state party must undertake in order to ensure the healthy development of children. Clearly, then, the duty on states parties to ensure to the maximum extent possible the survival and development highlights particular aspects of the right to life. In other words, the codification of the right to survival represents an acknowledgement that rights which protect aspects of a child's survival are interrelated and cannot be protected in isolation.<sup>39</sup> Consequently, the African Children's Charter reinforces this ideal by making particular provision which protects these interrelated aspects. The Charter achieves this by including within its ambit protections for basic survival needs such as the right to health, the right to adequate nutrition and safe drinking water,<sup>40</sup> and the right to be protected from customs and practices that are prejudicial to the child's life or health.<sup>41</sup>

The right to development, on the other hand, refers to the right of individuals, groups and peoples to participate in, contribute to, and enjoy continuous economic, social, political and cultural development in which all human rights can be realised. According to the UN Declaration on the Right to Development ('the Declaration'), the right also 'implies the full realisation of the right of peoples to self determination'.<sup>42</sup> Additionally, article 2 of the Declaration emphasises the personal nature of the right. It states that 'the human person is the central subject of the right to development and should be the active participant and beneficiary of the right to development.' Thus, within the context of the right to development in international law, the right also

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<sup>39</sup> G Van Bueren n 34 above at p 293.

<sup>40</sup> African Children's Charter, art 14

<sup>41</sup> African Children's Charter, art 21.

<sup>42</sup> UN Declaration on the Right to Development, UN Res 41/128 adopted 4 December 1986, art 1.

engenders the concepts of equality of opportunity and distributive justice for all. Consequently, it is clear that the children's right to development is not limited to the physical needs of the child but rather its all-encompassing nature emphasises the need to ensure the full and harmonious development of the child, including appropriate focus on the child's spiritual, moral and social growth. In this regard, the principle requires that states parties assume wider ranging obligations which ensure that children will be able to develop their talents and abilities to the fullest potential whilst preparing them for a responsible life in society with a feeling of solidarity towards the community of mankind.

The right to development is also a dynamic concept that stresses the importance of fostering and nurturing the many dimensions of the child. The African Children's Charter concretises this approach by protecting rights and freedoms that enhance the child's developmental attributes. These include guarantees relating to the child's right to education;<sup>43</sup> the right to rest and leisure; to engage in play and recreational activities and to participate freely in cultural life and the arts;<sup>44</sup> the right to be protected all forms of economic exploitation and from performing any work that is likely to be hazardous or interfere with the child's physical, mental, spiritual, moral or social development.<sup>45</sup> In addition, the Charter makes special provision for the development of disabled children by obliging states to provide special care and assistance appropriate to the child's condition in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development.<sup>46</sup>

By recognising the fundamental interdependence of various aspects of the child's life, the survival and development principle highlights the unity of purpose of the African Children's Charter's substantive as well as procedural provisions. The principle does not create new rights for children but merely serves to emphasise the holistic approach that must be followed in the promotion and protection of the rights and welfare of the child. Each one of the elements of the child's survival and development

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<sup>43</sup> African Children's Charter, art 11.

<sup>44</sup> African Children's Charter, art 12.

<sup>45</sup> African Children's Charter, art 25.

<sup>46</sup> African Children's Charter, art 13.

is equally important and states parties should strive to protect them all. For example, it would be counterproductive to protect the girl child from early marriage practices<sup>47</sup> without providing her with sufficient and accessible means to acquire an education.

### **5.1 Children's survival and development: Partnerships and resource networks**

Due to the broad scope of survival and development rights, the realisation of this principle entails satisfying a whole range of civil and political as well as economic, social and cultural rights. As a result, it takes a multifaceted approach employing different types of legal, economic, political as well as social resources and skills to guarantee these rights. As a matter of necessity, it requires the establishment of workable partnerships between various stakeholders in society; all of whom direct their efforts towards the achievement of the promotion and protection of the rights and welfare of the child. The state is one of these partners. But perhaps the most important partner of all is the family.

In the context of a developing country economy such as Malawi's, the state is often not in a position to guarantee children essential social welfare services such as free education, free health services, adequate nutrition or access to a reasonable standard of housing. Consequently, the bulk of the responsibility for providing these essential aspects of the child's survival and development falls to individual families. In other words, there exists a partnership between the state and individual family units in ensuring that children's survival and development rights are realised. In this regard, the state through its civil and criminal laws and through the limited provision of social welfare services endeavours to fulfil its obligations to promote and protect children's survival and development. On its part, the family complements these efforts by providing the emotional and material needs of the child. How effectively the family fulfils this role is a function of its perception of the obligations towards children as well as the level of economic resources that it has at its disposal.

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<sup>47</sup> Early marriage is described as 'another serious problem which some girls, as opposed to boys, must face.' See Office of the High Commissioner for Human Rights *Fact sheet no. 23 Harmful traditions affecting the health of women and children* p 17.

The first factor does not pose significant problems due in large part to the conception of childhood. As was discussed earlier, the child is considered a gift and someone that is entitled to special treatment. Consequently, under Lomwe tradition, the family regards itself as being responsible for the survival and development of the child by ensuring that the child is fed, dressed, educated and in good health.

However, the level of economic resources at the disposal of the family is closely tied to the structure of kin relationships which in turn affects the type of resource networks that children have for their survival and development rights. In the context of this thesis, a resource network is used to denote a concentration of financial, economic, social, emotional, political as well as informational resources to which members of that network can turn to for the satisfaction of different needs.

In this regard, the extended family offers access to different types of resources and capacities for the children within it. Since the guiding principle is that the child belongs to the whole family, it is not uncommon for a child to be looked after by his or her 'other fathers and mothers' on account of the inability so to do by his immediate parents. Parents realise the importance of this duty and children recognise and often enforce their entitlement to be supported by members of the extended family. For example, Caesar Muluta - a member of the focus group from Thyolo Secondary School - does not get financial support for his education at the secondary school from his parents. Rather, it is his elder sister's husband who provides everything for him and to all intents and purposes acts as his parent. Caesar does not need to ask for support, his sister's husband is well aware of his responsibilities.

The duty to support all children within the extended family is not only restricted to the provision of economic support but also extends to the provision of moral, spiritual and emotional support. This wide ranging focus on areas of support ensures the well-rounded growth of children who will eventually become well-adjusted adults. For example, when John Biswick's fourteen year-old son became unruly and violent at home, his wife suggested that they send him to the wife's sister's home for a few months. Recalling the incident, he says:

I had tried all options to discipline him but had failed...It got to the point where he would deliberately engage in discourteous behaviour and then challenge me to chastise him...I sent him to his younger mother for about four months. When he came back, he was a changed person. All the bad traits that he had demonstrated after getting initiated were gone.

Thus, the extended family system serves to provide a robust network of resources that is able to handle the different needs of children as they grow up. However, this capacity has become tested in contemporary times due to changes in the means of economic production and the resultant adjustments in the social organisation of the extended family. These challenges have arisen in large part because the extended family's resource network is premised on the proximity of the family members. Consequently, as individual family units have dispersed in search of jobs, marriage and other things, the ability of the extended family to guarantee children's survival and development rights has suffered some strain.

As a result of this state of affairs, the nuclear family has shot into prominence. More and more, children's survival and development rights have become the responsibility of the immediate family. Consequently, the resource network to which children have access has been reduced with dramatic effect on the prospects of children's survival and development. Mai Nahipa's observation that 'there never used to be orphans in Ndalama and Magombo village' exemplifies the situation. It is not the case that there were no orphans but the resource network used to be robust enough to take care of them. The rising numbers of orphans is merely a symptom of the breakdown of these networks as is the incidence of child labour.

Having regard to the unequivocal obligations that the state has assumed in respect of children's survival and development rights, one would have assumed that the state would step into the breach and supplement where the family is failing. However, the state's intervention has been less than effective and many children still continue to live on the margins. In order to mitigate the consequences of shrinking resource networks and the absence of credible partners, families have developed some supplemental networks which carry the burden traditionally borne by the extended family system. The supplemental networks include friendships; communal

relationships such as those between church members, workmates or neighbours; and informational networks such as gossip networks at the local beer garden or common water source.

All of these networks carry the burden for ensuring the survival and development of the child and are premised on the family's obligation to care for its young. In the life histories that I detail below, I demonstrate the function of the extended family as a resource network and the impact of change on its capacity and willingness to guarantee the survival and development of children within it. More importantly, the life histories highlight how children have acted to address their different situations.

### **Mercy Kanama**

Mercy is a sixteen year old girl from Ndalama village. Her father works as a foreman at a nearby tea estate whilst her mother is a housewife. Although Mercy and her siblings have lived in Ndalama village for all their lives, their parents are not from Ndalama village or Thyolo District. In fact, they hail from Dowa District in central Malawi. The family have been to see their relatives in Dowa a few times but Mercy recalls that the last time they visited was sometime back in 1998. Mrs Kanama suggests that the reason for the lack of visits is financial. Due to the growing size of the family and dwindling economic resources, it has become uneconomical to make trips to Dowa. However, Mercy also has a maternal uncle who lives in nearby Blantyre City and who occasionally visits them. Things have not been well for the Kanama's for the past four years because of the general economic malaise, rising commodity prices and stagnant salaries. The situation was made even grimmer in 2003 when Mercy and her brother were both selected to go to Mpinji Community Day Secondary School in Ndalama village thereby exerting even more pressure on already scarce financial resources. Mercy's father resolved the situation by electing to pay school fees for Mercy's brother and instructing Mercy to drop out of school because he could not afford to pay school fees for her. Mercy did not want to drop out of school. She, therefore, asked her mother to ask her uncle to plead her case to her father. The uncle was eventually



informed and when he talked Mercy's father, he was offered assurances that something would be done about Mercy's situation. The first term of the school year finished and there was no change in Mercy situation. When the second term started, Mercy informed her father about the promises he had made to her uncle but he simply responded that there was no money. In order to resolve her situation, Mercy acquired a boyfriend who is eight years her senior. He works as an automotive technician at a garage near the trading centre. The boyfriend undertook to pay her school fees and see her through secondary school. They plan to get married when she completes her secondary education. When I asked Mrs Kanama whether she approved of the arrangement, she simply shrugged and asked me: 'What else could she do?' To my questions whether she felt there was anything she could do to convince Mercy's father to support her education, she responded that she did not want any antagonism between herself and her husband especially since she was so far from home and that Mercy understood that apart from herself, her mother also had three other children that needed looking after.

### **Esnath Minjere**

Esnath is the 17 year old granddaughter of Mr and Mrs Mbingwani. Mr Mbingwani retired from the civil service in 1994 and has been living in Magombo village since. He has five children: four daughters and a son. One of the daughters works a nurse in Blantyre City whilst the rest, including Esnath's mother have got office jobs in Lilongwe. Mr and Mrs Mbingwani's children regularly send money and groceries to the homestead in the village. Mr Mbingwani also gets financial and material support from his brother-in-laws children who are regular visitors at their homestead. Consequently, even though the civil service pension which Mr Mbingwani gets is paltry, the Mbingwani's are able to live comfortably in retirement. Life for the Mbingwani's revolves around the homestead and their three gardens which are situated in Ndalama and Magombo village. The maize yield from the gardens is large enough to feed people at the homestead as well as provide some for the children who live in town.

Esnath takes an active part in the family's subsistence activities by preparing meals for persons employed to help with land preparation and working at the gardens whenever her school commitments permit.

Esnath was sent to live with her grandparents when she got pregnant at age 14 and would not disclose who was responsible for the pregnancy. After the baby was born, Esnath was sent back to school whilst Mrs Mbingwani looked after little Kondwani. Esnath is a very bright girl and at the time of my fieldwork was in the process of completing her secondary school education. She had discussed her options for the future with her grandfather and he was suggesting that she goes to secretarial school like her mother did. She, however, felt she would enjoy it more if she went to a technical school and trained as an electrician. Mr Mbingwani thinks being an electrician is a dangerous job and would suit a man better but is quick to point out that it is important to respect Esnat's choice.

### **Bridget Malindira**

15 year old Bridget is in Form 2 at Mpinji Community Day Secondary School. Her father died in 1999. She lives with her mother and two sisters in Ndalama village. When her father died, her grandfather and uncles came and collected everything from the house immediately after the funeral ceremony leaving them destitute. In order to provide for the family's basic needs, Bridget's mother sells brown cakes and eggs at Thyolo market. The money that she makes is insufficient to provide fees for Bridget's education. Consequently, every year at the beginning of the school year and during the holidays, Bridget and her brother (who is 11 years old) work at a nearby tea estate raising funds for school fees and uniform. For four years until 2003, Bridget has missed the first term of school, raising funds so that she could attend the second and third terms of the school year. However, under pressure from international organisations who had noticed that Malawian tea estates were employing child labourers, the Malawi government decreed that no estate should employ children. Bridget and her brother lost their jobs and with it the opportunity to raise money for school

fees. She and her mother went to her school to ask for a bursary but they were told there were none available. Consequently, Bridget missed school in 2003. Asking for support from her paternal family was out of the question given the manner in which they had grabbed their property after her father's death. Bridget was not alone in her predicament. There were a number of other families who also had been affected by the blanket ban on the employment of children. Some of these families got together and approached village head Ndalama who in turn approached the local member of Parliament about the situation. The local member of Parliament must have talked to some government officials because the company started recruiting workers-for-fees again even though there has been no official rescission of the ban. Bridget got her job back and was able to attend school again in 2004.

### **Morris Chapangana**

Morris is 16 years old. He lives with his mother and three sisters who are aged 11, 6 and 7 years old. In 2001, Morris's father left to work as a tenant on a tobacco estate in the northern part of Malawi. He subsequently broke off all communication with his family and would not respond to the family correspondence to him. When his father left and sent no support, Morris's mother went to the district welfare office to ask for assistance. Unfortunately, they were told that the only help that was available was for orphans. Since Morris and his sisters were not orphans, they could not be helped. Due to lack of financial support, Morris left school. He was in grade 5. He subsequently started undertaking some odd jobs in order to supplement the family income. The odd jobs included carrying luggage for passengers travelling to and from Thyolo bus depot. He also used to supplement this business activity with a roasted peanut business which he would sell to commuters. After saving enough money, he started selling roasted maize and bottled drinks. This enabled him to contribute more to the family purse. Eventually, his long presence at the bus depot allowed him to become a minibus tout. Touts advertise the destinations of the various buses that stop at the depot and once the bus fills up, they get the

equivalent of the fare to the bus's destination. This undertaking is more lucrative than selling commodities at the depot. Morris brings home the money he makes where it is spent on food, buying clothes and also making sure that his sisters are able to go to school. Morris's mother has not been able to carry out any economic activities since 2003 because she has been experiencing ill-health and is, therefore, physically weak. However, in February 2004, the family started receiving some material support from the women's guild of the church at which Morris's mother attends. This development has enabled Morris to save some money which he intends to use to train as a minibus driver.

The life histories described above demonstrate the implications of resource networks in relation to the realisation of the survival and development rights of the African child. In particular, they show how resources impact on the general principles of the African Children's Charter. Mercy's case exemplifies very well how discrimination against children; and girl children in particular, flourishes when there are inadequate resource to go around. Her predicament has led her to draw from an outside and perhaps an unorthodox resource network in order for her to lessen the impact of the discriminatory actions against her and satisfy some of her survival rights such as the right to education. However, her choice may have an impact on her best interests in short or long term since her access to her boyfriend's resource network is premised on his continued goodwill. Her immediate needs have postponed a consideration of such implications.

Mercy's case contrasts sharply with that of Esnath. By living with her grandparents, she has been able to access a resource network that is far more robust than if she had stayed with her parents. More significantly, she has not had to face the discriminatory treatment that some girls who have fallen pregnant at her age have had to face. Mrs Mbingwani sought to explain their willingness to look after Esnat and her baby in terms of changes in cultural perception. She said:

This does not mean that it was always acceptable for children to become pregnant without following proper procedures. Such things brought shame to the family. Nowadays, however, it happens in every family and so no one can really point fingers...and young

men are quite happy to adopt children that are not their own. So things have really changed.

Mrs Mbingwani's observations highlight changing norms in response to changing behaviour. However, her views do not adequately capture the role that resources play in aid of such cultural change. Indeed, there were several cases of girls in Magombo and Ndalama village who were bringing up children in very difficult circumstances because their kin had refused them access to their network of resources once they had sought to increase the number of mouths accessing that network by becoming pregnant. Although the shame-and-consequence may be justified as a 'cultural' response to pregnancy outside marriage, considerations relating to access to resource networks should not be ignored.

Mrs Kanama reckons that denying a child access to education is tantamount to destroying that child's future. However, she was powerless to stop her husband from withdrawing financial support for Mercy's education. Whilst she sympathised with her husband's financial situation, it was also clear to her that the decision to take Mercy out of school was not in her best interests hence her implicit support for Mercy's efforts to secure an alternative source of support to ensure that she continues with her education. In Mercy's case, the immediate need to ensure that she goes to school has postponed critical consideration of the effect a serious relationship with a man eight years her senior may have on her best interests. If Mercy had access to an alternative resource network, it is doubtful that such a relationship would have been countenanced let alone considered as being in her best interests. It is, therefore, not easy to determine where a child's best interests lie especially when resources are scarce. The cases of Bridget and Morris also illustrate this conundrum. There have been a lot of studies made into the impact of child labour in sub-Saharan Africa and the majority of experts condemn the practice, especially when it has deleterious impact on children's lives.<sup>48</sup> The African Children's Charter itself calls upon state parties to protect all children from all forms of economic exploitation and from

<sup>48</sup> See, for example, Sonia Bhalotra 'Child labour in Africa' OECD Social Employment and Migration Working Paper No. 4 (OECD Publishing, 2003). Paper also available at <<http://lysander.sourceoecd.org/vl=613343/cl=23/nw=1/rpsv/cgibin/wppdf?file=5lgsjhvj7pw.pdf>> (accessed 22 December 2006).

performing any work that is likely to be hazardous or to interfere with the child's physical, mental spiritual, moral or social development.<sup>49</sup> On the face of it, the work which Bridget undertakes at the estate could potentially interfere with their physical and social development and may therefore be considered as constituting child labour. However, she depends on that very job to ensure her survival and development. A question that I asked interviewees in Ndalama and Magombo village was whether it was in the best interests of a child to preclude children who were working at the estate in order to raise money for school fees and uniform. The answer was a resounding 'no'. By proscribing children from working without providing accessibility to an alternative resource network, the government was acting against the best interests of children. Bridget herself made a poignant observation in this regard: 'Girls who are denied an opportunity to go to school may end up in prostitution. What is worse?'

With regard to children's survival and development rights, it is clear that the type of resource network to which the child has access determines the quality of those rights. Rights to health, shelter, food, water and education all depend on the existence of resources. Morris Chapangana had to drop out of school when support from his father dried up and government agencies could not step in. The story is somewhat different for his sisters since he has stepped into the breach and provided them for an alternative network which is also supplemented by his mother's church connections. Similarly, Bridget relies on a network which includes the tea estate. Once that branch of her network is isolated, her survival and development rights are threatened. Mercy, on the other hand, has adopted an unorthodox means to securing her survival and

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<sup>49</sup> African Children's Charter, art 15(1). The provision continues in art 15(2):

States Parties to the present Charter take all appropriate legislative and administrative measures to ensure the full implementation of this Article which covers both the formal and informal sectors of employment and having regard to the relevant provisions of the International Labour Organization's instruments relating to children, States Parties shall in particular:

- (a) provide through legislation, minimum wages for admission to every employment;
- (b) provide for appropriate regulation of hours and conditions of employment;
- (c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of this Article;
- (d) promote the dissemination of information on the hazards of child labour to all sectors of the community.

development rights by getting a boyfriend who is able to allow her access to his network of resources.

It is clear from the foregoing that although there is clear acceptability of the survival and development rights of the child, the manner in which the relevant provisions of the African Children's Charter will be realised in relation to each individual child depends on the strength of the resource network to which such child has access. If it is weak, then it is more likely than not she may not enjoy protection from discrimination, or that her participation or survival and development rights will not be protected. Access to a network of resources gives the child power. It provides the ability to insist that her best interests are protected. Without the empowering presence of a resource network, the rights and welfare of the child are liable to be violated. In this regard, it is clear that the state should do more in honouring its side of the partnership with the family. Failure to do so is forcing many children to live on the margins of society.

## **6 Participation: A brief introduction**

There are several participation provisions in the African Children's Charter. However, the principal ones are articles 7 and 4(2). Article 7 provides as follows:

Every child who is capable of communicating his or her own views shall be assured the right to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws

This provision is supplemented by the content of article 4(2) which guarantees that:

In all judicial or administrative proceedings affecting a child who is capable of communicating his or her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority on accordance with the provisions of appropriate law.<sup>50</sup>

<sup>50</sup>

The other participation provisions include article 8 which guarantees the child freedom of association; article 9 on the child's right to freedom of thought, conscience and religion and article 12 which enshrines the child's right to participate freely in cultural life and the arts. Article 13(1) and 27(2) provide specific detail on the participatory rights of disabled children

The participation principle applies to *all* matters including judicial and administrative proceedings. It, therefore, cuts across the whole spectrum of issues relating to the rights and welfare of the child. It, therefore, qualifies as a general principle which should be considered in all matters relating to the protections provided by the African Children's Charter. Clearly, therefore, the participation principle is a lynchpin in the scheme set up by the African Children's Charter. Yet, accounts of children's rights in Africa often highlight the absence or restriction of these rights for children.<sup>51</sup> In this regard, a considerable proportion of accounts emphasise the place of respect in relations between children and adults. This picture, however, is only partially correct and represents only some pieces of the mosaic that is children's participation.

The right to participation is perhaps the best known children's rights principle. In local terms, it is known as *ufulu wamwana wolankhula za kukhosi* [or the right of the child to speak his or her mind] In the local language, the phrase *kulankhula za kukhosi* or speaking one's mind is a very descriptive one which carries with it the image of someone airing out something that could otherwise choke them. The right to freedom of expression is therefore loved by many children because of the notion of freedom that it engenders and loathed by conservative adults because of the seeds of rebellion that it apparently sows.

The oft-cited aphorism that children should be seen rather than heard is not representative of the practice in Lomwe society. Since socialisation principally relies on oral traditions, it is almost axiomatic that talking between adults and children

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and children in conflict with the law, respectively. Curiously, however, the African Children's Charter does not make provision for the right to seek, receive and impart information even though this is an integral part of the participation rights regime under the African Charter. (See art 9(1). The participation principle is also a key theme of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 13 September 2000 (entered into force 25 November 2005) CAB/LEG/66.6. (See preamble para 8; arts 9, 10, 17, 18, 19, 23.

<sup>51</sup> See, for example, D Chirwa 'The merits and demerits of the. African Charter on the Rights and Welfare of the Child' (2002)10 *International Journal of Children's Rights* p 157. AIDS Alliance 'Participation' available at <<http://www.aidsalliance.org/sw3065.asp>> (accessed on 22 December 2006).



cannot be avoided. Consequently, there exist various channels of communication between children and adults. Whilst the existence of these modes of communication is not always indicative that children's views were taken into account, it nevertheless provides evidence that children were not only seen but also heard. Participants cited various arrangements intended to enable children express their views. These included play [which incorporates various modes of expression such as song and dance, recitals and role play], communicating directly to parents and communication through intermediaries. I examine these different types of communication and their role in aiding children's participation below.

Children's play is more than mere amusement and is sometimes used to convey messages to parents. According to Yaya:

A good parent knows that it is important to lend a good ear to what children are doing outside because through their various activities, one is able to gauge whether they are happy or sad. This is especially necessary in the case of the girls. If during *fulaye*<sup>52</sup> one gentleman's name keeps popping up, or if during tug-of-war, your daughter's friends keep pairing her up with a certain boy, a good parent knows that it is about time you checked her room and prevent events from overtaking you.

The view that children's play is used as a means of communication was confirmed by several young participants. One of these, Mercy Kanama recalls that she used to utilise role-playing as a means of asking for favours from her mother. For example, if she wanted a new dress; she would go on for days acting in a play where the mother buys her daughter a new dress.

This mode of communication was also used to relay important messages. For example, Patrick's mother recalls that Patrick used role play to complain about his father's drink-induced abusiveness:

He would sometimes be the father. He would pretend to be drunk and scold his 'child' in a very harsh manner. I talked to my *ankhoswe*<sup>53</sup> to tell his father about it...Things did

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<sup>52</sup> *Fulaye* is a two team game mainly played by girls and which involves one player dodging a ball thrown players of the other team.

<sup>53</sup> Marriage counselor or advisor.

change, at least for a while.

In addition to role-playing; song and dance is also used to communicate with elders. In this regard, parents often convey instructions to young people in performances during special ceremonies such as those celebrating the birth of a child, a marriage or during initiation. Children are also able to use this mode of communication either during play or initiation ceremonies.

Although the means of communication related to play are often unstructured and may yield no response from the adults concerned, they still represent an important repertoire in the exchange of opinions between parents and children. In a society where respect and distance are expected, this means of communication offers an option to children and their guardians.

Another method of getting children's input into the family decision-making process is through the deployment of intermediaries. In particular, communication through grandparents was identified by many participants as constituting the most reliable channel for children's participation. In this regard, it is noteworthy that the relationship between children and grandparents is characterised by feelings of friendship and openness. Oftentimes, a child will be closer to the grandparent than he or she is to the parents. Consequently, many important issues including those considered too taboo to be the subject of a polite conversation between a child and his parents, are a proper subject of conversation between children and their grandparents. The robust nature of this relationship serves to convey important messages during socialisation such as those relating to honour, loyalty, sacrifice, and duty. This is done through the recital of fables, recollections of family traditions and proverbs or simply by letting the child sit through conversations involving the grandparent and his or her friends.

The close relationship between village head Magombo and his daughter's nine year old son, Fred, is typical of these relationships. Describing Fred as his brother, he says:

When I hold court, I make sure he is at my side as long as he is not in school. His mother is somewhat strict with him and he may be too scared to ask questions of her...During

court hearings, he sits quietly and listens but once the visitors are gone, the questions begin. When he goes for initiation, he will not be totally uninformed like his peers.

Another example is that of Esnath Minjere (whose life history was detailed earlier), who elected to discuss the details of her pregnancy with her grandfather only and refused to talk about it with the female members of her family.

More importantly, however, the relationship between the child and the grandparent provides an essential role in ensuring that the child's interests are taken into account when adults are making decisions.

Since the grandparent is very close to the child, he will often discuss matters with the child and ask the child's opinion on major questions concerning the child. The grandparent then transmits these opinions to the person exercising parental rights over the child. Given the grandparent's special position as a patriarch or matriarch of the family, it is clear that his or her rendition of the child's choices, often voiced as his own suggestions, carry more weight than if the child had attempted to address the issues himself or herself. Through this role, the grandparent protects the child from the consequences of not having a direct voice in the family decision-making process and provides children with the opportunity to participate. In other words, by trying to harmonise the interests of the family with the child's individual interests, the grandparent provides some balance in the hierarchical social structure which ordains that the younger you are the less you speak.

Another important intermediary is the mother. A child's relationship with the mother is not only very respectful but also very intimate. Mai Sambalikagwa observes of her relationship with her daughter who is now married:

She is like my sister. We tell each other *zapantondo*<sup>54</sup>. Before she got married and was still our responsibility, I made sure that her father knew of her needs...She was a very shy girl and would not sit in the same room as her father.

In some respects, the mother's relationship with her children, especially girls, mirrors

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<sup>54</sup> Tales from the maize mill-denotes gossip and other juicy stories.

that between a grandparent and his or her grandchildren. The major difference is that due to the patriarchal set-up of the family, women who are not advanced in age do not have as much influence on the family decision-making process as have the men or family patriarchs. Consequently, the mother's role in facilitating participation is sometimes limited.

It is therefore clear from the foregoing that the existence of various forms of communication channels demonstrates that Lomwe custom does not prohibit children from expressing themselves. In addition, the wide ranging scope of the kind of matters that could be addressed through these mechanisms indicates that children's participation is not restricted to mundane matters but also includes important issues such as those pertaining to marriage, custody and others. The existence of rigid repertoire relating to children's participation supports the view that under custom, children do not have the freedom to express their views at any time or any place but does not indicate the absence of participation structures. The importance of this observation is that the participation rights of the child detailed in the African Children's Charter are not out of place within Lomwe society.

The channels of communication detailed above worked well in traditional society when the extended family lived in close proximity and family decision-making was more or less centralised. However, changes in socio-economic patterns and the resultant mobility of rural folk have impacted on these various modes of participation. One of the most obvious change is the obvious need for direct communication between children and decision makers within the family. In the following section, I discuss how these changes have affected the participation rights of the child and how family discourse has responded to such changes.

## **6.1 Adaptation and resistance: A tale of rudeness and freedom**

For the past one hundred and fifty years or so, the traditional Lomwe social structure has had to contend with and in some cases yield to the changes brought about by Christianity, colonialism, independence, democracy, human rights and globalisation. The impact of these various changes in the manner in which the family handles its affairs has been profound. Where a community is organised on the basis of sharing

and mutual support, the interests of individual members are subsumed or aggregated with those of the group. Under these circumstances, individual interests are not loudly articulated and this tends to minimise the risk of conflict between group interests and those of the individual.<sup>55</sup> With such a relatively harmonious social co-existence, the importance of an individual's direct participation in important decision making is not seen as crucial in protecting his or her interests. The interests of the community and those of the individual are so interwoven that community leaders who assume the role of decision-makers can be trusted to determine at a general level what best serves the interests of all including children without needing to solicit their views.

However, the social forces that were detailed above have upset this equilibrium. One evident effect of these socio-economic changes in Magombo and Ndalama village is the mobility of family members in search of jobs, marriages and other attractions of a twenty first century economy. It is therefore the case that children no longer live in the same households as their grandparents. Regular contact between children and their grandparents which is the bedrock of the latter's intermediary function, is no longer guaranteed. In these two villages, a significant proportion of the village folk are not originally from the village. Many came to Thyolo district to look for work at the nearby tea factories as well as at the government departments at the *Boma*.

Furthermore, the changes in living arrangements have also affected the transmission of the art of communication through song and dance. Irregular contacts between children and the 'bearers' of tradition has meant that the opportunity to learn about these modes of communication is sometimes lost. Contemporary consumption patterns have also affected the relationship between children's participation through song and dance. With western music forms taking hold over many youngsters, the art of imaginative discourse through music, poetry and dance is slowly slipping away.

Thus, changes in the social organisation of the family have profoundly affected the structures that facilitated children's participation. These changes have made it

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<sup>55</sup> B Rwezaura 'The duty to hear the child: A view from Tanzania' in W Ncube (ed) (1998) *Law, culture, tradition and children's rights in Eastern and Southern Africa*, Sydney: Ashgate, 1998) p 59 at p 84.

necessary for supplementary or alternative structures of communication to be developed and utilised. One of these supplementary structures is exemplified by the demands for direct participation. These demands have been bolstered by at least two factors: necessity and the awareness of children's rights.

In the first place, the metamorphosis of the extended family from a close-knit centralised unit to far flung family units has made the representation models for effecting children's participation somewhat inefficient in executing that role. Consequently, it has become necessary for persons that are directly responsible for the child's daily care to provide the participation structures. This state of affairs has elevated the importance of the nuclear family which has found itself at the centre of the child's participation needs. However, since most parents were brought up under the traditional representation participation regime, they are ill-equipped to handle these new family dynamics.

Secondly, the awareness of the child's participation rights has encouraged children to demand that they be allowed 'to speak out what is in their throats'. Recognising the importance of respect between the generations, children are increasingly insisting that their respect will be earned once they are given the opportunity to express their views. However, demands such as these fly in the face of the unequivocal principle of respect to elders at all times.<sup>56</sup>

Consequently, parents increasingly see the assertiveness now prevalent in their children as evidence of the moral breakdown of society attributable to the neglect of the old way of doing things. In response to the perceived 'rudeness' of their children, some parents insist that the traditional modes of participation should be emphasised and that the idea that children should be allowed to air their views is too disruptive to be allowed to take root. John Monjeza is one such parent and he puts across his views in the following manner:

Nowadays, if you ask your own child to carry out a little errand for you, he will refuse and tell you in the face that it is his freedom to refuse and yet another freedom to inform you of his refusal. During our time, one could not even think of such a response for fear

<sup>56</sup> African Children's Charter, art 31(a).

your thoughts could be heard. If I had dared answer my father in such a manner, I would have been sent for initiation for a second time in order to be taught good manners. Democracy<sup>57</sup> has brought good things but it has also brought so much disrespect...One could beat this rudeness out of the young people but who wants a visit from the police? It seems to me that democracy is good but only for the young ones.

The equating of the child's participation rights with rudeness has built resistance to the idea that children are entitled to freedom of expression. Thus, parents whose reference point is the traditional model of participation, see the demands for direct participation as a species of discourtesy.

In reaction, this stance has made children's demands for parents and people in authority to respect the right to air one's views even more insistent. For the children, whose point of reference is democracy, freedom and human rights, the reference to the traditional modes of expression seems overly restrictive and inconsistent with the idea of being free. Unedited excerpts from an essay entitled 'Should parents listen to their children' written by Laudon Samson from Thyolo Secondary School captures the frustrations of both parents and children in the attempts by both camps to navigate the treacherous minefield of participation rights in the context of entrenched views on respect and 'proper' modes of child participation:

The parents should not listen to their children just because she/he is young or the children are younger than the parents, so they think that the children cannot talk any wise or meaningful to them since they are young...

The parents should not listen to their children due to the history of children nowadays...the majority of them are smoking...Indian hemp, drinking beer and [taking] drugs. So these things makes the parents to think that children cannot talk anything helpful [and] as a result, they don't listen to them.

Other parents listen to their children but they don't use the things that the children talk to them, because they think that if they use the advice or the things that they heard from their children, those children would think that they are superior. As a result the parents just listen but they don't use it.

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<sup>57</sup> The era of human rights and democracy talk dawned at the same time in Malawi. Consequently the two ideas are sometimes used interchangeably.

Some parents are so cruel and when their children talk to them they start shouting because they think that they are being rude and that since they are grown ups, they should not listen to their children. Some parents even [go to the extent] of chasing their children away from their home.

Other parents listen to their children but at the end they ask you questions. For example, they ask you questions like these: What makes you say so? Who told you to do that? What was your expectation about that? So these questions interfere with the children's [efforts] to talk to them and as a result the children think that the parents do not listen to them.

Some parents accept the advice...their children talk to them but are minor in number and they thank their children about the things they talk to them about.

The essay demonstrates the differing entry points onto the issue of participation by both children and parents. At first glance, it may seem that traditional perspectives on participation and the new ideas related to 'democracy' and children's rights are far apart. At the rhetorical level, there is no obvious consensus, with parents decrying the unbelievable insolence of children and the children failing to understand their parents' old-fashioned ways. However, the fact that many families have not been thrown into a crisis is indicative of the fact the two paradigms are interacting in a manner that is not fatal to family harmony.

The crucial point from this is that as long as there is a basis for children's participation within Lomwe society, arguments about the exact nature of those participation structures are essentially non-fatal and sooner or later, there will be a resolution. The challenge is ensuring that such a resolution favours the promotion and protection of children's rights.

## **7 Concluding remarks: Children's rights in cultural practice**

The protection and promotion of the rights and welfare of the African child is in large part about influencing the day to day child rearing practices of families. If the intention of ensuring the best protection for each and every African boy or girl is to be



achieved, the principles of the African Children's Charter must be translated into practice on the ground. The preceding analysis of the Charter's general principles brings into sharp relief the importance of existing cultural logics and categories in the acceptance or rejection of the various principles that make up the international children's rights corpus. The existence of child-rearing practices that are akin or supportive of particular principles make arguments in favour of introducing or adopting the 'new' principles easier since the relevance of those principles is already culturally accepted. In other words, the cultural legitimacy of children's rights norms is easier to establish in situations where local practice has already laid the ground work for appropriation.

However, even where there are existing narratives which are supportive of children's rights practice, the process is not straight-forward and does not avail itself to predictability. This observation is due to the fact that the local appropriation of a transnational institution such as children's rights transforms underlying cultural categories and practices. However, at the same time, the appropriated institution itself is itself adapted and sometimes radically transformed. As parents and children such as those in Magombo and Ndalama village seek ways of combining their conceptions of family practice and children's rights norms, they not only redefine their cultural landscape but they also redefine the international children's rights corpus itself. Consequently, the image of children's rights that emanates from the process is a rich mosaic of local practice infused with international imperatives. It, therefore, goes without saying that any analysis of this process should avoid essentialising culture or children's rights as constituting strict categories.<sup>58</sup> Rather than portraying culture and children's as exemplifying a conflict between universalist and relativist world views, the data from the fieldwork ably demonstrates that 'culture is a field of creative interchange and contestation, often around shared symbols, propositions or practices.'<sup>59</sup>

<sup>58</sup> SE Merry 'Changing rights, changing culture' in J.K. Cowan, M. Dembour & R. A. Wilson (eds) *Culture and Rights: Anthropological Perspectives* (Cambridge: Cambridge University Press, 2001) p 31 at p 50.

<sup>59</sup> J.K. Cowan, M. Dembour & R. A. Wilson 'Introduction' in J.K. Cowan, M. Dembour & R. A. Wilson eds. *Culture and Rights: Anthropological Perspectives* (Cambridge: Cambridge University Press, 2001) p 1 at p 5.

In seeking to determine the cultural legitimacy of the rights and welfare of the child, investigations into such shared symbols, propositions and practices requires a methodology which focuses on detailed case studies so that an analysis of child rearing practice and its intersection with culture, and children's rights is not formulated in abstract forms but is located in specific, concrete experiences derived from the lives of children and their families. This requires deconstructing the conception of 'child' as a universal and homogenous category and considering children as being rooted in specific cultural and historic categories. The African Children's Charter's insistence on culture and context is supportive of this type of methodology. A methodology which is sensitive to context, raises the legitimacy of the principles underlying the children's rights system and gives rise to a pluralism that is neither universalist or relativist but one which is grounded in the reality of children's daily lives.

In the next chapter, I take the quest to go 'local' even further by considering how national and local institutions could take an active part in the creation of pluralist pro-children's rights narratives.

## Chapter 7

### Cultural legitimacy and the implementation of the rights and welfare of the African child: Institutions and process

#### 1 Introduction

The analysis of the core concepts of the African Charter on the Rights and Welfare of the Child ('the African Children's Charter' or 'the Charter')<sup>1</sup> in the previous chapter demonstrates that the level of cultural support for the norms on the rights and welfare of the child varies from principle to principle and from person to person. Some norms enjoy a high level of legitimacy whilst others are regarded as constituting a threat to the accepted cultural standards. The challenge for governments that have subscribed to the normative standards of the African Children's Charter and for children's rights activists and others involved in children's rights work in these countries, is to seek to achieve a raised level of cultural support across the whole range of the rights in the Charter.

In this regard, it should be noted that although the African Children's Charter makes a strong case for grounding children's rights norms within the context of African traditions and civilisation,<sup>2</sup> it anticipates the problem of the lack of universal cultural consensus for its prescriptions and consequently makes provision for tackling this problem. The Charter does this by providing for implementation mechanisms and strategies aimed towards the institutionalisation and internalisation of children's rights by states parties to the Charter and their citizens. This chapter is a critique of these procedures and mechanisms. For the purposes of this analysis, these mechanisms and strategies have been separated into two paradigms: the formal and the informal. The formal mechanisms refer to the processes that are identified and elaborated on by the Charter itself as constituting the steps of implementation that states are encouraged to undertake. The informal mechanisms include any other strategies that are not spelt out

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<sup>1</sup> African Charter on the Rights and Welfare of the Child, adopted July 1990 (entered into force 29 November 1999) OAU Doc.CAB/LEG/24.9/49 (1990).

<sup>2</sup> African Children's Charter, preamble.

by the Charter but come within the ambit of implementation strategies by virtue of implication or interpretation. However, the distinction is not so rigid as elements of one category may be present in the other.

The previous chapter makes the case for the presentation of children's rights norms in terms of symbols and images that resonate well with local cultural categories. Sally Engle Merry has succinctly labelled this process the 'vernacularisation' of human rights norms.<sup>3</sup> In this chapter, I propose that this perspective be taken further to include not only the definition and understanding of the norms on rights and welfare of the child but also the implementation processes available under the African Children's Charter. Viewed from this perspective, the present chapter is a continuation of the previous chapter's attempts to map out an understanding of children's rights that remains true to the African Children's Charter intent for a strong foundation based on African tradition and civilisation.

This chapter is divided into six sections the first of which is this introduction which briefly outlines the problem of the lack of universal legitimacy and how the African Children's Charter seeks to tackle the problem through both formal and informal implementation mechanisms. The second section offers more width to the structure of the formal mechanisms and how they are intended to work. The analysis is followed by a critique of the formal mechanisms in the third section which demonstrates how reliance on such mechanisms alone does not guarantee the raising of the general profile of children's rights at the local level. Consequently, the fourth section suggests the incorporation of local institutions in children's rights work in order to complement the traditional methods. The section goes on to identify several institutions that could be utilised as partners in the efforts to raise the cultural legitimacy of children's rights. In the fifth section, I offer an appraisal of the local institutions and their general potential for effective children's rights protection. Since local institutions are not 'designed' to carry out children's rights work, I make a few

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<sup>3</sup> SE Merry 'Legal pluralism and transnational culture: The Ka Ho'okolokolonui Kanaka Maoli Tribunal, Hawai'i 1993' in RA Wilson (ed) *Human rights, culture and context* (London: Pluto Press, 1997) p 29.

suggestion on how to engage them in such work in the penultimate section. This section is followed by general concluding remarks.

## **2 The formal protection of children's rights**

Under the African Children's Charter, the formal protection of children's rights relies on a mixture of both domestic and supranational processes. Central to the operation of the supranational processes is the role of the African Committee of Experts on the Rights and Welfare of the Child ('African Children's Committee' or 'Committee') which is given the general mandate of promoting and protecting the rights enshrined in the Charter.<sup>4</sup> In particular, the Committee is charged with the duty of monitoring the implementation of the rights enshrined in the Charter; ensuring their protection;<sup>5</sup> and interpreting the Charter's provisions.<sup>6</sup> These tasks are fulfilled through the exercise of the Committee's two principal functions: The examination of state reports and the consideration of individual communications.

Under article 43 of the Charter, every state party to the Charter undertakes to submit to the Committee periodical reports on the measures that the state party has put in place to give effect to provisions of the Charter. The Committee's powers under the state reporting system are very extensive. The Committee's mandate extends to examining any information that is relevant to the issue of implementing the rights and welfare of the child.

The mandate to examine state reports is complemented with the communications mechanisms. Under this procedure, the Committee may receive communications for any person, group or non-governmental organisation recognised by the African Union, a member state or the United Nations in relation to any matter covered by the Charter.<sup>7</sup> Once the Committee is satisfied with the admissibility of the communication before it, it will proceed to hear the merits of the communication and subsequently make a binding decision on the matter.

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<sup>4</sup> African Children's Charter, art 42(a).

<sup>5</sup> African Children's Charter, art 42(b).

<sup>6</sup> African Children's Charter, art 42(c).

<sup>7</sup> African Children's Charter, art 44(1).

With regard to the domestic processes which constitute the second limb of the formal implementation processes, states parties to the Charter undertake to recognise the rights, freedoms and duties enshrined in the Charter and to adopt in accordance with their constitutional processes such legislative or other measures to give effect to the provisions of the Charter.<sup>8</sup> Thus, the Charter envisages that states parties to it will incorporate its provisions in their constitutions or national legislation as well as through policy development and implementation.

Both the domestic and supranational implementation activities are aimed at the domestication of the African children's Charter into local law. The singling out of 'legislative' in article 1 of the Charter is not by accident but indicates a preference for state-centred measures that focus on parliamentary processes and the resulting legal structures that enforce children's rights. Thus, the main thrust of the formal mechanisms is to put in place structures that ensure the legal justiciability of the Charter's various principles. This approach is laudable for it ensures that children are able to claim their rights at the domestic level and; in case their claims are not satisfied at that level, to take their cases up to the African Children's Committee.

However, because of various structural and institutional reasons, legal protection strategies that focus on domestication and justiciability may be slow in raising the cultural legitimacy of children's rights. In the section below, I analyse the scope and efficacy of the legal protection model and its impact on children's rights protection.

### **3 The scope and efficacy of the legal protection of children's rights and the prospects for cultural legitimacy**

Notwithstanding procedural differences amongst the various legal protection mechanisms at both the domestic and supranational level, narrowly conceived legal protection comes down to justiciability. This model of children's rights protection requires the court or tribunal to identify an individual victim, the wrongdoer and then to pronounce a remedy for the violation. According to this model of children's rights

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<sup>8</sup> African Children's Charter, art 1.

protection, when children or their representatives believe that rights have been violated, the aggrieved party may institute a claim for redress before a court of law or tribunal. If the issue is not settled out of court, a trial may follow whereby the court will determine whether a violation has occurred and direct the implementation of appropriate remedy. For example, if a child proves that she is being denied access to education by a particular state policy or actions of state employees, a court will direct that the offending policy be discontinued or order that state officials refrain from implementing or effecting the policy.

It is clear from the above example that this conception of legal protection presupposes that the violation of children's rights is the exception rather than the rule, because the slow and often expensive process of judicial vindication of rights on a case by case basis cannot ably cope with systematic violations or competently tackle the systemic absence of cultural legitimacy for certain children's rights principles. Justiciability also assumes that potential victims can afford to pay for or have alternative means of support for access to legal services; that the judiciary is independent and effective; that government officials will comply with judicial orders; and so forth. In the context of children's rights protection in a poor economy such as Malawi and indeed many other African countries, this model of legal protection is not only limited, exclusive, expensive and inaccessible to most African children and their families but it is also limited in its ability to inculcate a general culture of respect for the rights and welfare of the child and therefore the raising of the cultural legitimacy of this category of children's rights.

There are various reasons for this rather pessimistic outlook. Effective legal protection assumes the existence of several factors that favour the proper adjudication of human rights disputes. These factors include a certain degree of political stability, economic resources, institutional capacity, and the willingness to resort to the courts for the enforcement of children's rights. However, there are various systemic problems that militate against the realisation of these factors.

For example, many African states suffer from chronic political instability which in turn critically impinges on the independence and ultimately the efficacy of the judicial

system.<sup>9</sup> The absence of political certainty renders the protection of human rights by the judicial branch very difficult because state commitment towards protection is often unsustainable. Consequently, human rights abuses often thrive in situations where the political authorities are weak and incapable of effectively carrying out state functions.

In addition, many states do not enjoy a large economic resource base and because of the need to prioritise allocation of scarce resources, the judicial branch of government is often under-resourced. In particular, resources set aside for implementing human rights obligations are often paltry in comparison to other projects considered as being of national priority such as infrastructure development. In many cases, the implementation of human rights obligations voluntarily entered by the state parties is left to foreign aid organisations and the ubiquitous international non-governmental organisations. The situation is exacerbated due to the abuse of resources by public officials which ensures that there are even fewer resources to go around.<sup>10</sup> The result, therefore, is a weak judicial system which often is not capable of competently handling the legal protection of human rights.

Another reason that impacts on legal protection is the absence of institutional capacity to effectively handle legal cases. There are not enough judicial workers and many do not receive proper training.<sup>11</sup> Consequently, the judicial system is often overburdened yet does not possess the requisite expertise to deal with its caseload. In jurisdictions where this is the case, the legal protection of human rights will not be efficacious.

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<sup>9</sup> See generally, M Iaryczower, PT Spiller & M Tomasi 'Judicial decision-making in unstable environments: The Argentine Supreme Court, 1936-1998' (2002) 46 *American Journal of Political Science*, pp 699-716; See also R Messick 'Judicial reform and economic development: A survey of the issues (1999) 14 *The World Bank Research Observer* pp 117-36.

<sup>10</sup> See generally JM Mbaku 'Bureaucratic corruption in Africa: The futility of cleanups' (1996) 16 *Cato Journal* pp 99-118.

<sup>11</sup> CA Odinkalu & I Kane 'An assessment of information and training resources' in AA An-Na'im (ed) *Universal rights, local remedies* (London: INTERIGHTS, 1999) p 65 at pp 74-86.



Furthermore, legal enforcement presupposes that people will come before the court for the vindication of their rights but the prospect of facing court is a daunting prospect for many citizens. Lawyers and judges who are often decked in strange garb and often speaking in tongues do not inspire the confidence as they are supposed to. The reaction of most citizens is to keep away from the courts.

Thus, at a practical level, the protection of children's rights is seriously impeded by the absence of strong judicial structures which suffer from perennial incapacity. In addition because of their complexity and procedural formality, the judicial system is often incomprehensible and financially inaccessible for the vast majority of African peoples. These factors, coupled with procedural requirements in many jurisdictions that allow children access to judicial services only if they are represented by an adult, means that the prospects of legal protection resulting in the realisation of the rights and welfare of the child are somewhat limited.

More importantly, however, strict adherence to the legal protection model discourages the development of a more harmonious relationship between children's rights and culture concentrating as it does on the state sanctioned machinery for the vindication of rights. It encourages the adoption of an abolitionist approach that simply calls for an end to cultural practices that contravene principles on the rights and welfare of the child.<sup>12</sup> According to Nyamu-Musembi, such approaches do not encourage a holistic understanding of the context in which cultural practices relevant to the protection and protection of human rights are embedded.<sup>13</sup> More importantly, however, such approaches assume that the possibility of the realisation of children's rights does not exist in local practice or custom, and can be found only in alternatives offered by national legislation or the international children's rights regime.<sup>14</sup> This rendering of implementation efforts presents various theoretical as well as practical difficulties. First, it assumes a radical disjuncture between the sphere of custom and the sphere of

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<sup>12</sup> See generally C Nyamu-Musembi 'How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries?' (2000) 41 *Harvard International Law Journal* p 381.

<sup>13</sup> As above, at p 383.

<sup>14</sup> As above, at p 387.

formal law and institutions, thereby obscuring the active role that state apparatus plays in shaping cultural norms at the local level and vice-versa. Second, the assumption that local practices offer no basis for children's rights pre-empts an open-minded assessment of local practice and institutions, which assessment could lead to the recognition and utilisation of whatever positive openings are presented by general principles of fairness and justice in a community's value system. Consequently, potential opportunities for collaboration with community members committed to social change that would promote the cultural legitimacy of children's rights are forfeited.

Viewed from this perspective, it is clear that state courts and law enforcement mechanisms alone are often not sufficient tools for addressing the systemic denial of children's rights that occur at the local or rural level. Yet, despite such limitations, legal protection of children's rights remains the preferred model for the vindication of children's rights at international law. For example, an analysis of the Committee on the Rights of the Child's concluding observations on Malawi's initial report<sup>15</sup> reveals an almost inevitable gravitation towards state-centric mechanisms. Thus, recommendations are directed towards institutions such as Parliament, the judiciary, the Police, independent human rights organisations, the Malawi Law Commission and non-governmental organisations to name but a few. However, given the level of congruence between the majority of Malawi's children and these institutions, insisting on legal protection may serve to leave many out of protections envisaged under the African Children's Charter.

Raising the cultural legitimacy of children's rights norms therefore requires the recognition of the inadequacy of the traditional means for protecting human rights. Given the reality of the African institutional and economic development, to wait for the prerequisite conditions for the realisation of effective legal protection of children's rights to materialise, is to condemn this category of human rights into obscurity. This thesis does not propose ignoring legal protection as a means of securing the

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<sup>15</sup> Committee on the Rights of the Child *Concluding observations of the Committee of the Rights of the Child: Malawi*, CRC/C/15/Add.174, available at <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.174.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.174.En?Opendocument)> (accessed on 22 December 2006).

promotion and protection of the rights of the child. Rather it is proposed that the focus of implementation models also be shifted to 'other measures' as anticipated under article 1 of the Charter. The open-ended nature of the provision allows for imaginative responses tailored to suit local situations and help achieve broader, more affordable, accessible and inclusive protection regimes aimed at raising the cultural legitimacy of children's rights. Such an approach is also clearly in line with the call that the virtues of African cultural heritage, historical background and the values of African civilisation should inspire the conception and protection of the rights and welfare of the African child.

#### **4 From the legal to the local: Local institutions and the cultural legitimacy of children's rights**

The preceding analysis demonstrates that the implementation strategies that are solely based on legal protection focused on justiciability may founder and fail to address the critical need for raising the cultural legitimacy and profile of children's rights. Consequently, it is crucial to identify complementary processes that aid in the implementation of children's rights. In this regard, it may be useful to focus on the capacity of local administrators and informal social institutions in helping raise the profile of the African Children's Charter's prescriptions within local communities.

In the discussion that follows, I identify some institutions that could aid in this endeavour. I identify the leading actors in these institutions and generally discuss their mandate in the regulation of social life at the local level.

##### **4.1 Key local institutions in Lomwe country**

A brief overview of the institutions involved in articulating and mediating custom and customary practice within Lomwe society offers a glimpse into the intermeshing of the formal and the informal; the local and the national; the general and the particular in the lives of ordinary people. In the following analysis, I focus on the constitution and competence of four institutions: the clan, the chief's court, the *boma* and the church. I outline the characteristics that make these four suitable candidates as complementary institutions to those involved in the legal protection of the rights and

welfare of the child. There are of course other local smaller-scale intra- and inter-family processes of interaction of which the situations that get presented to these fora are only a small part. Nevertheless, the working of these institutions provides an opportunity to analyse intra-family processes of negotiation, conflict management, norm-setting and enforcement. An examination of these processes could ultimately determine how to engage the institutions involved in endeavours aimed at enhancing the profile of the prescriptions of the African Children's Charter.

## 4.2 The clan

As was noted earlier, many Lomwe families have moved from their ancestral lands to other areas in search of land, wives and other opportunities. However, affiliation to traditional family structures remains very strong. In this regard, many Lomwe families identify themselves with a clan or *mtundu*. Apart from meaning clan, the word *mtundu* may also be used to denote colour and its usage to describe family relations conveys the notion of familial unity that is present in different hues of the same colour. A clan may be broadly be described as a subgroup or section of the larger ethnic group or community whose common bond springs from a common identity emanating from shared ancestry. Just as colours have many shades, the degree of actual biological relationship amongst the members varies since the common ancestors usually date back several generations.

The clan's affairs are dealt with by a select group of elders who have the authority to settle disputes between family members, arrange weddings, manage funeral ceremonies as well resolve inheritance issues. The elders are arbiters of customary law and will decide cases in reference to custom and tradition. However, with the Christianisation of many Lomwe families, biblical references are not uncommon. The mandate of the clan committee is almost unlimited and they will deliberate on any matter that is brought before them as long as the parties belong to the clan.

Thus petty thefts, land disputes, divorces and desertion, child neglect, drunkenness, fundraising for intra-family support are all within the purview of the committee's competence. Such robust capability ensures that there is an accessible forum for mediating issues that involve the family members. However, it is not the robust nature

that is the most remarkable characteristic of the clan committee. Rather, it is the respect that family members have for the elders sitting on the committee. Decisions and pronouncements of the committee are more likely to be followed than not. The traditional requirement of *ulemu* or deference which requires one to respect elders at all times;<sup>16</sup> coupled with the authority that customary law commands, makes the clan committee a very powerful institution within Lomwe society. Consequently, it could be a sturdy plank in the implementation path towards the realisation of the rights and welfare of the child.

### 4.3 The chief's court

Another important institution at the local level is the chief's court. The family and the chief work closely together and support each other's roles. Chiefs are the adjudicators of local custom but they are also the agents of government. Their role often involves carrying out official government policy whilst at the same time ensuring that Lomwe culture and customary law is respected.

The chief ensures that events such as those relating to initiation, funerals, weddings, rain-seeking, witchcraft protection are observed with the correct rituals. In addition, chiefs also have the duty of explaining government laws and enforcing those laws. They have the duty to implement government development policies at the local level; and the power to take measures which ensure that citizens take part in development activities.

The chief usually carries out his tasks with the help of a council of elders. The elders act as a well-spring of wisdom as well as the authority on matters relating to customary law. When a matter comes before the chief, they help him sift through the issues, identify the applicable laws and wisdom; and the chief makes decisions dependent on these factors. The participation of elders within the chief's court serves to endow the chief's decisions with even more credibility and authority. Consequently, even though, the chief may not be an old man, his authority is

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<sup>16</sup> With regard to the position of the Charter on children's duty of respect, see African Children's Charter, art. 31(a).

respected by virtue of his position. According, to Village Head Ndalama, even the most daring witches are scared to play around the chief's compound.

In exercising their powers as the heads of the village, chiefs rely on an eclectic mix of formal law and customary law; justifying their authority and actions on the basis of both the formal and the informal. Chiefs are the face of an often absent government bureaucracy but they are also the custodians and purveyors of tradition and customary law. They are administrators, law-makers, judges and law-enforcers. The chief's position is raw power in action. The chief's court is the place where disputes are settled, deals concluded, and directives issued. It is where the buck stops, at least most of the times.

The chief and his court are therefore uniquely positioned to act as arbiters for constructive change, occupying as he does, a position whose authority derives from custom as well as the formal legal system.

#### **4.4 The *boma* or the district commissioner's office**

The district commissioner's office represents the lowest rung of the formal civil service. Each of Malawi's 28 administrative districts has a district commissioner. He, or increasingly in recent times, she, is viewed as the embodiment of government itself at the local level. This relationship between central government authorities and the district commissioners office explains why the latter's offices are also known as *boma*, a term which is also used to denote the central government apparatus.

The district commissioner has the mandate to deal with a wide range of issues affecting local communities. To illustrate the varied nature of his role, it is worth pointing out that he or she is responsible for registering marriages, registering births, recording deaths, administering deceased's estates, supervising local policing, supervising local social welfare programs, implement government development programs, resolving local administration hitches such as disputes between village heads. The district commissioner is therefore *boma* in the truest sense of the word. However, he or she is also part of the local power structures and is expected to take

part in events such as the opening of a new church, the reception of newly graduated initiates, the pouring of libations by rain-seekers amongst other ceremonies.

The district commissioner's widely drawn mandate has enabled him set up mechanisms for the provision of dispute settlement facilities even though strictly this should be a function of the local sitting magistrate. At Thyolo *boma*, the district commissioner has delegated the running of this mechanism to the police with the expressed intention of giving the structure visible authority. In this regard, the police have set up a quasi-court structure for filtering and resolving diverse disputes. The 'court' is known as '*chipinda cha zokambirana*' or 'the discussion room' to differentiate it from the formal court which is about 100 metres away. The discussion room is also known as '*kumphasa*' or 'the place of the mat' because disputants are made to sit on a reed mat and face each other, much in the same way that intra-family disputes are resolved by the clan committee. Each party is then encouraged to make its case in a respectful manner and the police officers, who dress in civilian clothes and also sit on the *mphasa*, discuss with the parties involved on how best to proceed. If the matter cannot be resolved, then the officers will either reschedule the matter for 're-discussion' or refer it to the chief's court, the clan committee or the formal court whichever forum is appropriate.

The preceding analysis demonstrates how a formally constituted office relies on aspects of both the formal and the informal to achieve positive results. The innovative linkages between police, traditional authority and local manners suggest an awareness of the importance of local context and values in the conduct of government activity. This is the kind of innovation that could become handy in the implementation of the rights and welfare of the child.

#### 4.5 The church

As I observed in the previous chapter, the Lomwe are generally very religious people. They often combine western- or eastern-inspired monotheistic worship with traditional spiritual beliefs. Consequently, the institution that has come to represent organised Christian worship, the church, is therefore central to the lives of many people in Magombo and Ndalama villages.

Apart from ensuring that their members are spiritually healthy and are in a position to see the way to salvation and receive the ultimate prize of eternal life, churches are also very active in their members' social life. Most churches operate social welfare schemes for their members. These schemes are mostly run by the women's organisations within the churches and through them, members are able to access social assistance during events such as illness, funerals, weddings, births and others. It is also not uncommon for a church to run ad hoc dispute resolution committees intended to sort out issues between members or between members and the church.

Further still, some of the churches also take an active role in educating their congregations about human rights, democracy and other issues relating to politics. For example, the Roman Catholic Church, the Anglican Church and the Church of Central Africa Presbyterian are very active in this area of ministry, regularly putting out pastoral letters that instruct their faithful and government on issues such as promotion and protection of human rights, the right to food, respect for the rule of law, good governance, corruption, socio-economic and other political issues.<sup>17</sup> Reverend Kungsiya of the Living Waters Church in Magombo village explains the rationale for his church's involvement in issues other than the strictly spiritual by observing that the church is a steward for its members with a duty to ensure that they have comfortable lives on earth whilst looking forward to the trouble free eternal life. The impact of the church's intervention in these areas of life is exemplified by the removal from power of Malawi's long-time dictator, Hastings Kamuzu Banda, whose exit was precipitated by a pastoral letter issued by Roman Catholic bishops.<sup>18</sup>

<sup>17</sup> For a sample of these pastoral letters, see Church of Central Africa Presbyterian 'Some worrisome trends which undermine the nurturing of our young democratic culture' (2001) available at <<http://www.webwshpsdnorg.mw/church/ccaphtml>> (accessed on 22 December 2006), Roman Catholic Church 'Celebrating the centenary' (2001) available at <<http://www.webwshpsdnorg.mw/church/ecm.html>> (accessed on 22 December 2006), Roman Catholic Church 'Rejoicing and vigilantly living in hope' (2002) available at <<http://www.webwshpsdnorg.mw/church/ecm2frame.html>> (accessed on 22 December 2006).

<sup>18</sup> See generally M Mitchell "Living Our Faith: The lenten pastoral letter of the bishops of Malawi and the shift to multiparty democracy, 1992-1993' (2002) 41 *Journal for the Scientific Study of Religion* pp 5 - 18.



In most churches, the pastor, bishop or reverend is the leading figure. He or she is helped in his role by a host of deputies that assist him in administering to the faithful. Although the actual arrangements vary from congregation to congregation, the assistants usually include lay or assistant preachers, church elders, deacons and deaconesses. The deacons and deaconesses have an especially important role because they are the ones that carry out the donkey work for the church ensuring that programs relating to social support and dispute resolution are implemented. Given the expansive role that the church plays in people's lives and the influence on how people conceive and perceive the world around them, the church could be a worthwhile partner in the quest for greater protection of children's rights.

In the next section, I discuss the potential of these institutions in the promotion and protection of human rights generally and the rights and welfare of the child in particular.

## **5 Local institutions and the potential for children's rights protection**

The capacity of local institutions and agents to participate in the implementation of children's rights through the legal protection model is limited. Lack of technical capacity required in the interpretation and enforcement of children's rights makes it almost impossible for these forums to act as adjudicative institutions for children's rights. However, these institutions have for a long time been involved in the regulation of many different aspects of local mores and practices that have a direct bearing on children's lives. As I have observed above, the strengths of these institutions lie in the construction of alternative and equally strong paradigms for the implementation of children's rights norms. In this regard, it is noteworthy that institutions such as the chief's court, the clan committee, the *boma* and the church have all been at the forefront of dispute resolution, norm creation, adjustment and enforcement at the local level. The body of rules called customary law has ebbed and flowed through the mediation of these institutions, evolving all the time in order to keep up with the needs and demands of the community through different times. There are several attributes that make local institutions particularly suited to a more prominent role in the protection of children's rights. These include, among others, the

ability to institute change in both the procedural and substantive aspects of local custom; the enjoyment of almost unlimited jurisdiction in terms of matters that they can handle; the low costs involved when they regulate matters; their proximity to individuals who resort to their structures and the benefit of culturally legitimate authority in the exercise of their powers.

A good illustration of the important role played by a local institution in the fusion of local practice and formal mandate for the achievement of some socially functional result is provided by the operation of *kumphasa* by the local police officers. Another good example of how an indigenous institution undertakes norm creation and attitude change in favour of children's rights is provided by the manner in which Village Head Ndalama dealt with the practice of *fisi* (hyena) during girls' *chinamwali* or initiation ceremonies. The practice entails that at the end of formal instruction during the initiation period, the *fisi* (who is a man) goes into the compound where the initiates are ensconced to 'examine' whether they are able to practice the concepts and theories which they have been taught regarding sex and sexuality. Since *afisi awiri sapasula khola limodzi* (two hyenas cannot attack the same kraal), one *fisi* would necessarily have sexual intercourse with all the initiates during the course of the 'examination'. Given the prevalence of HIV/AIDS in Malawi,<sup>19</sup> the harmful nature of the practice cannot be gainsaid. Although it is very difficult to get concrete and accurate data regarding the effects of the practice due to the secretive nature of the initiation process, its consequences on the socio-economic fabric of the community are no less dire. Long and cumulative illnesses such as those associated with HIV infection not only ravage the patient but also deplete already meagre resources as poor families attempt to provide care for their sick. Household economic productivity falls because sick children can no longer fulfil their rightful roles in the subsistence setup of their families and other family members' time is spent in looking after the sick child. These factors only serve to exacerbate the already inadequate support during illness. The impact on the girls themselves is grave. They can no longer continue their education due to ill-health. They have to face discrimination because of the taboos associated

<sup>19</sup> At the end of 2005, it was estimated that 14.1 percent of Malawians aged between 15 and 49 were HIV positive. See UNAIDS/WHO 2006 Report on the global AIDS epidemic available at <[http://data.unaids.org/pub/GlobalReport/2006/Annex2\\_Data\\_en.xls](http://data.unaids.org/pub/GlobalReport/2006/Annex2_Data_en.xls)> (accessed 30 April 2006).

wit HIV-related illness. For most, the result of HIV infection is a slow, agonising and often lonely death. Thus, although the practice fulfils some local values, it may also violate many rights such as those to life, health and protection from abuse.

Village Head Ndalama was acutely aware of these problems but he faced a grave dilemma:

I am the custodian of the traditions of our ancestors. The initiation of girls when they reach maturity is a tradition of our ancestors. Part of the tradition calls for the practice of *fisi*. If we do not conduct these rites for our girls, the ancestors are not going to look at us with favour and soon the village will soon be full of girls whose only business will be going to *chibuku*<sup>20</sup> in the evening.

However, continuation of the initiation course with its current content constituted a certain health risk and it was Ndalama's duty as chief to seek ways to mitigate it. He consequently approached the village's elders responsible for *chinamwali* and arranged together with the advisers of the chief's court, for a *bwalo* or a roundtable meeting. He began the meeting by extolling the virtues of *chinamwali* and how the ceremony helped instil a sense of discipline in young men. He then proceeded to suggest that whilst the initiation ceremony must be retained, the practice of *fisi* had to be done away in view of the health risks it posed to the maidens of the village.

However, the elders remained adamant, arguing that the initiation of girls was crucial because nobody wants a wife who is not properly trained. They further argued that the marriages of women who had not been properly trained frequently ended in divorce and that nobody wanted a wife they were sure to divorce a few years down the line. These arguments were met with the response that a divorced wife was better than a dead wife or worse still no wife at all (because all the girls had died from HIV/AIDS). To emphasise this point, Village Head Ndalama contended that the whole initiation process was directed at ensuring a happy family life and this ideal would be shattered if the wife fell sick or died during the marriage.

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<sup>20</sup> *Chibuku* is a local beer brewed from maize. The taverns where the brew is sold are also known by the same name.

Conceding the logic of these arguments, the elders relented and advised the women who manage the *chinamwali* ceremonies that examinations by *fisi* were no longer necessary and that they should be excised from the curriculum. The practice no longer takes place in Ndalama village and Village head Ndalama points out that many *afisi* have been put out of job.

The preceding analysis demonstrates how the chief, using a combination of tactics including negotiation, persuasion and argument, managed to influence crucial modifications to an established custom of the Lomwe whilst at the same time retaining his position as a custodian of Lomwe culture. By consulting not only his advisers but also the elders, the chief made sure that the resulting decision not only achieved the right result but also that it was acceptable to the custodians of Lomwe tradition. More importantly, however, the case above demonstrates the potential which local institutions have for children's rights protection. Although the process which was adopted was not adversarial such as that present in many adjudicative models, it nevertheless does deliver protection for the rights of girl children.

The capacity for children's rights protection is certainly innate within the clan committee. Although not framed in the language of international human rights laws, deliberations and decisions on many issues touch upon aspects of human rights. Matters such as the resolution of land disputes, the determination of custody arrangements for children after divorce, the imposition of sanctions for neglect of parental duties, the organisation of rain-seeking ceremonies, or the arrangement of witchcraft protection campaigns all have a bearing on diverse rights such as the right to survival and development, the right to food, the right to family life and the right to parental care and protection.

In addition to the ability to influence change, local institutions also offer affordable and accessible forums of first resort for the vindication of children's rights claims. For many children living in rural areas, formal legal enforcement of their rights is an option available only in theory on account of the costs involved as well as the concentration in major cities of the mechanisms associated with formal enforcement. In contrast, local institutions are available locally and do not have the same financial demands. For instance, matters at *kumphasa* are held on a first come first served basis

and there is no need to make an appointment. This is unlike the process at the formal court nearby where the filing of summons and the issuance of writs required the payment of prescribed fees. Similarly, the chief court does not demand payment though at the end of the case it is usually considered polite to leave the chief a little something as a token of thanks.

However, the competence to preside over issues relating to diverse matters including those relating to children's rights protection does not, some of the times, carry with it the ability to bring into play concerns that are at the heart of human rights protection. In this regard, there are several attributes of local institutions that militate against their inclusion as capable children's rights protectors. These factors include the fact that some institutions are not representative; that they are driven by a patriarchal ideology.

Children are not adequately represented in local institutions and the adults who staff these institutions usually take it upon themselves to represent the children. For example, Village Head Ndalama admits that at the time he resolved the issue relating to the use of *afisi* during girls' *chinamwali* activities, he did not regard it as crucial to consult the girls who had been involved because he considered that they would not convince the elders because, being very young, they knew nothing about Lomwe traditions. Thus, within the framework of local institutions, young age is not an asset and often prevents children from playing a meaningful role in decisions that directly affect them.

With respect to the particular position of children within the arrangements of local institutions, the situation is not very encouraging. The traditional customary requirement that children should respect elders at all times<sup>21</sup> entails that children cannot directly vouch for their cases before the chief's court or the clan council. This factor, coupled with the belief that adults always act in the best interests of children, means that the participation of children in these forums is oftentimes overlooked.

In addition to restrictions grounded on age, Mai Nahipa observes that an underlying attitude that favours male domination over other groups such as women and children

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<sup>21</sup> See African Children's Charter, art. 31(a).

also pervades many local institutions. She highlights this problem by referring to the constitution of the chief's court and the local development committee which are principally staffed by men. Referring to the resolution of property disputes after a husband's death; Mai Nahipa adds that the result of a strong male presence on committees and councils is that both the deliberative as well as the adjudicative functions of local institutions tend to favour men:

There is no one to represent women when issues are being discussed. As you know, a lot of women are shy and would not freely speak against family members...And when one is quiet, it is often taken to mean that they consent to the decision and this is not always the case.

In other words, embedded ideas about authority, gender and the role of children seem to constrain open deliberation on the facts and to dictate a resort to idealised statements of custom that necessitate a particular culturally appropriate outcome.<sup>22</sup> Decision-makers in these local institutions seem to be aware of the tacitly defined boundaries that regulate interpersonal relationships both within and outside the family. In day-to-day interaction, what forms of authority and entitlement are seen as legitimately belonging to an adult or a child or what levels and quality of audience a child is entitled to is a matter of tacit understanding. Unspoken agreements on how these issues ought to be resolved are at the back of adults' and children's minds as they interact with local institutions whether as decision-makers or claimants.

If local institutions are to have any positive impact on the promotion and protection of children's rights, it is crucial that children should have meaningful input into their deliberative and decisional processes. The question of voice and participation in shaping and modifying custom and cultural usage is very important in a cultural setting. The internal dynamics for mediating cultural norms and change through local practice does have a direct correlation on the prospects for the realisation of children's rights at the local level. Since these norms are ultimately articulated as a species of *chikhalidwe chathu* or 'our way of life', or 'our culture', the importance of contributing towards their formation cannot be gainsaid.

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<sup>22</sup> See A Hellum *Women's human rights and legal pluralism in Africa: Mixed norms and infertility management in Zimbabwe* (Oslo, Mond Books: 1999) pp 42-44.

Yet, as observed above, key institutions at the local level are run predominantly by men. Most clan committees in Magombo and Ndalama villages are almost always, the exclusive domain of males. Women sometimes do play a deliberative role, but the decisional aspects are almost always the preserve of a male elite. Similarly, men also dominate the chief's court and the assembly of his advisors are also men. However, Village Head Magombo has included Mai Nahipa, the human rights expert, on his council because of pressure from *ajenda* or women's rights activists. However, Mai Nahipa does not enjoy general membership of the committee but rather her participation is restricted to matters which involve women's issues—a limitation which could operate to include her in all matters or as in the case with her, exclude her from most. Significantly, however, no local institution has co-opted children within their ranks.

Other concerns relate to how power and knowledge dynamics impact on the ability of local institutions to properly protect children's rights. Legal pluralists correctly observe that people draw from a variety of normative orders in plural society as suits their situation.<sup>23</sup> Within the pluralist legal framework, it is therefore possible to conceive of people being able strategically to pick and choose from the formal law and from custom or religion positive elements that benefit them most.<sup>24</sup> Under this framework, children, for example, could at least in theory utilise the positive elements of both custom, formal law, administrative procedures or local institutions that give them the best possible chance for the enjoyment of their rights.

In practice, however, the ability to do this may be predicated upon other factors such as power and knowledge. As the analysis above has demonstrated, clan committees as well as the chief's court are not accessible by all people equally. Those that are more powerful, usually men, enjoy almost unfettered access to these institutions whilst those who do possess such power do not. Children are a good example of those that are powerless and, therefore, voiceless.

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<sup>23</sup> SF Moore *Law as process: An anthropological approach* (Oxford: James Currey Publishers, 1978) pp 54-81.

<sup>24</sup> A Hellum n 22 above at p 424.

Lack of knowledge regarding existing options for enforcement of one's rights and in some cases, ignorance of the implications of possessing the rights affects the manner in which local institutions uphold the rights and welfare of children. Knowledge of children's rights principles operates in two related dimensions. It ensures that not only do the people holding positions in local institutions respect the rights and welfare of the child but also that children have the confidence that if they bring their complaints before such forums, they are assured of adequate redress. For example, amongst the 66 children that I interviewed during face-to-face interviews and focus group discussions, 59 indicated that they had never heard of the local social welfare office, a department of government within the district commissioner's office mandated to resolve issues relating to the rights and welfare of the child. Furthermore, whilst many children knew about *ufulu wa ana* or the 'freedoms' of the child, they did not know the forums that could take on their complaints if those rights were not respected. Some made vague references to the clan committee, aunts and uncles as avenues of redress but could not say if they had used this procedure in the past or how they would use it in future if it became necessary. Similarly, although the officers at *kumphasa* indicated that they would take on cases brought by children without the traditional requirements to speak through their aunts or uncles, only one boy out of all the children I had interviewed had gone to complain about excessive disciplining even though this was identified as a problem by many of them.

Knowledge about the options available in one's locality gives children and their guardians more control. It avails them power to insist that various entitlements that accrue to them should be honoured. Consequently, knowledge about local institutions and their capacity for children's rights protection is an essential ingredient if these institutions are to be positively engaged in the promotion and protection of the rights and welfare of the child.

In light of the preceding discussion, engagement with local institutions requires a mitigation of the negative aspects coupled with the enhancement of the positive attributes. Mai Nahipa points out that in Magombo and Ndalama villages, this process is already at work. She points out as examples, her appointment as a women's issues advisor to Chief Magombo's council; her frequent consultations with Village Head



Ndalama; and the decision relating to the modification of aspects of girls' *chinamwali*. Indeed these examples augur well for the protection of human rights generally and the rights and welfare of the child in particular. However, more still needs to be done to bring local actors and institutions to embrace more fully the protection of children's rights as a fundamental aspect of their responsibilities.

## **6 Incorporating local institutions in the implementation of children's rights: process and prospects**

Engaging local institutions to take a more proactive role in the implementation of the rights and welfare of the child requires a sustained policy of engagement that seeks to influence the day to day child-rearing practices of African families. Since the only common denominator that marks out local institutions is their diversity in terms of structure, jurisdiction, procedure and level of influence, it is difficult to draw-up a blueprint that would be helpful in the efforts to engage these institutions as credible partners in the promotion and protection of the rights and welfare of the child. However, this difficulty notwithstanding, it is still possible to develop a few pointers that would be useful to government agents and children's rights activists generally.

In the first place, it is important to understand the basic structure of the institution that is sought to be involved. This is the case because such an investigation helps in the identification of key personnel that are not only the gatekeepers in terms of accessing the institution but are also influential in introducing and managing change politics within the institution. Consequently, their role in shepherding through understandings of childhood and child-rearing that are controversial or regarded as 'new' is all the more critical. In this regard, the role of Village Head Ndalama in managing changes to the processes and curriculum of *chinamwali* offers a very good example of how a key person can influence change. In identifying structure and key personnel, it is also important to note that it is not only the heads of institutions that are influential. Lower rung participants or members may sometimes have even more respect than the nominal heads of an institution. Such respect is often borne out of respect for the concerned member's age or perceived wisdom. This is the case with individuals like advisers in the chief's council or a grandmother within the clan structure.

In addition to understanding the structure of local institutions, it is also imperative to have particular regard to their basic procedures. This is necessary because it enables one to structure any proposed engagement with the concerned institution in terms that comport well with accepted processes. By following established procedures, the introduction of new ideas or modifications to existing ones does not seem as threatening to established order as otherwise would be the case. Thus, cultural legitimacy does not only speak to substantive arguments in favour of the rights and welfare of the child but also to the procedural elements.<sup>25</sup> Approaches that do not accord sufficient respect for the procedural observations of local institutions run the risk of rejection and therefore forestall the opportunity for substantive discourse and change.<sup>26</sup>

Furthermore, there is a need to understand the sphere of influence of local institutions and how such influence relates to the protection of the rights and welfare of the child. For example, in the case of the clan committee, it is somewhat obvious that it is influential in the upbringing of children and therefore has a direct impact on how families or members of families protect or violate the rights of children. This situation is easily contrasted with the position of an institution such as the church whose primary role is the pastoral care of its flock. The provision of instruction relating to the upbringing of children is an important part of the church's mandate but is certainly not the primary concern. An awareness of an institution's sphere of influence would enable children's rights practitioners to engage with the institution providing the most benefits with the least deployment of economic, human and knowledge resources. Given the scarcity of available resources within most African communities, a strategy such as this would facilitate a more rapid achievement of the universal cultural legitimacy of the rights and welfare of the child.

Lastly, any attempts at involving local institutions in children's rights work must be alive to the concept of respect or *ulemu* and the role the concept plays in day-to-day interaction. The concept of *ulemu* requires that in order to be taken seriously, any

<sup>25</sup> T Kaime 'The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections' (2005) 5 *African Human Rights Law Journal* p 221 at pp 233-234.

<sup>26</sup> As above.

agent working for the protection of the rights and welfare of the child must show deference to the local institutions that he or she may work with. In particular, *alendo* or strangers (which denotes anyone from outside the village) must demonstrate through their manner and disposition that they respect the established traditional customs and beliefs of the Lomwe. According to Mai Nahipa, the concept of *ulemu* calls for more listening and less talking. She observes that for an impatient children's rights activist, this process of building trust and ones credentials may seem like time-wasting. However, without earnest attempts to earn the people's trust, the likelihood of access to institutions that could help in children's rights work is slim.

What the preceding analysis demonstrates is that in order to raise the cultural legitimacy of the rights and welfare of the child; there is need to develop an organic approach to implementation. Such an organic approach contextualises the African Children's Charter's normative prescriptions within the African child's local settings and makes use of institutions that already enjoy legitimacy within those settings. The development of a holistic understanding of children's rights implementation requires the fleshing out of an ethnology of children's rights that does not shy away from challenging certain basic propositions of the dominant discourse in human rights implementation. It requires the drawing of innovative alternatives that firmly place the African child at the centre of workable solutions intended to raise the cultural legitimacy of children's rights. The process is not simple but the prospects are immense.

## 7 Concluding remarks

The formal legal protection of the rights and welfare of the child is a key plank in the efforts towards the realisation of this category of human rights. However, the capacity of the legal protection model alone to achieve the universal cultural legitimacy of children's rights remains limited at best. It is, therefore, crucial to incorporate other locally available and locally relevant structures to complement the efforts that are undertaken under the aegis of formal legal protection. This includes but is not limited to the incorporation of local institutions such as the chief's court and clan committees in the active promotion and protection of children's rights. Incorporating local institutions has several obvious advantages, not least among which is the question of

affordability, accessibility and legitimacy, attributes which are largely absent from the formal legal protection model but nevertheless very important for rural folk. However, notwithstanding their obvious advantages, local institutions have some non-positive traits that need to be addressed if they are to effectively contribute to the realisation of universal cultural legitimacy for the rights and welfare of the child. In this regard, the problems that I identified above may lead to doubts regarding any potential gains to be made through the engagement of local institutions in the promotion and protection of the rights and welfare of the child. Indeed, many children's rights practitioners would vehemently object to the suggestion that local institutions have any useful part to play in the protection of children's rights. For these activists, such a notion is untenable because these institutions and local practice are the very culprits that are responsible for the denial of children's rights

However, children's rights activists ignore the possibilities of local institutions at their own peril. Unless the purpose of children's rights implementation efforts is to guarantee the continuous flow of seminar circuits that harp on the same old topics and bemoan the lack of cultural legitimacy for children's rights, it is necessary to figure out ways of engaging with the processes at the local level including local institutions. If children's rights are to be taken off the pages of legal texts and transferred from the boardrooms of children's rights NGOs and translated into the reality of children at the local level, then engagement with local institutions cannot be avoided. Such engagement is necessary as long as formal protection mechanisms remain inaccessible due to financial and spatial considerations. It is necessary as long as local institutions continue to influence the local normative orders and set the agenda for its modification. It is necessary as long as the African children's Charter itself embraces and celebrates the role of local institutions in the implementation of the rights and welfare of the child through local institutions.

The quest for effective protection of children's rights favours no blueprint. Engagement with local institutions in addition to the traditional means of human rights protection through legal protection serves to widen the menu of options available to children and children's rights activists. There is no reason, therefore, for ignoring these institutions.

More importantly, however, local institutions have a better shot at improving the cultural legitimacy of children's rights than centralised bodies operating from the city. Although laws and edicts from the capital are important, norms that have been filtered through the local cultural sieve hold a lot of sway. This explains why a government ban against the use of child labour on personal farms has been largely ignored. It also explains why a government directive that children who do not have a school uniform should not be turned away from school was largely ignored and only enforced when Village Heads Ndalama and Magombo organised a meeting with teachers and heads of schools in their villages. Given the influence of local institutions at the local level, it is worthwhile equipping them with the technical capacity to actively and consciously promote and protect the rights and welfare of the child.

The promotion and protection of the rights and welfare of the child is ultimately about influencing the manner in which children are brought up. Since families and local institutions are very involved in the sphere of child upbringing, it is only proper that they are involved in the efforts to raise the cultural legitimacy of children's rights.

## Chapter 8

### Concluding analysis

#### 1 Introduction

This thesis set out to address the question whether the African Charter on the Rights and Welfare of the Child ('the African Children's Charter' or 'the Charter')<sup>1</sup> provides a culturally appropriate framework for the promotion and protection of the rights. It did this by an analysis of the Charter's provisions in light of existing jurisprudence on the rights and welfare of the child and through an examination of field data drawn from Ndalama and Magombo village. The thesis has attempted to answer the central question posed through an examination of various practical and theoretical issues pertinent to the realisation of the norms contained in the African Children's Charter. In chapter four, I analysed the theoretical debates relating to universalism and relativism, highlighting how this discourse is relevant for the children's right project in Africa. In particular, I demonstrated how contemporary perspectives on the debate had moved the debate beyond the old categories of universal and local and how the Charter was an integral component of these contemporary debates. Chapter five sets out a discussion of the whole basis of the Charter: the twin conceptions of 'child' and 'childhood' and analyses how culture impacts on these concepts and ultimately on the promotion and protection of the rights and welfare of the child.

Having introduced the beneficiaries of the Charter, the thesis then discusses the core concepts of the Charter in Chapter six. Existing jurisprudence is used to thrash out the meaning of these core concepts and the analysis is tempered by the consideration of fieldwork data which tests the concepts and their claims of cultural legitimacy. The conclusion to this chapter is that the Charter is a mixed bag of culturally legitimate norms as well as not-so-legitimate propositions. Consequently, chapter seven explores how the universal cultural legitimacy of all the Charter's substantive provisions may

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<sup>1</sup> African Charter on the Rights and Welfare of the Child, adopted July 1990 (entered into force 29 November 1999) OAU Doc.CAB/LEG/24.9/49 (1990).

be achieved. It analyses the Charter's explicitly stated mechanisms as well those that are included by interpretation and implication to test their contribution towards raising the cultural legitimacy of children's rights. The evidence from Magombo and Ndalama village, I conclude, is that there is no blueprint for the realisation of children's rights. Consequently, innovative approaches towards implementation, ones that enjoy local legitimacy and encourage the participation of local actors and institutions should be developed and encouraged.

In this chapter, which is the concluding analysis of the thesis, I go back to the discussion engaged in the above chapters and offer a brief summary of the whole thesis by examining the central themes discussed and the questions raised. Three major themes emanate from the previous seven chapters. They include the changing conceptions both of culture and children's rights; the importance of cultural legitimacy in the protection of children's rights; and the impact of cultural appropriation on both the substantive and procedural aspects of the rights and welfare of the child. In the subsequent sections, I unpack these various themes with particular attention to their relationship to the African Children's Charter. After this analysis, I supplement the discussion with an examination of suggestions and recommendations relating to the promotion and protection of the rights and welfare of the child.

## **2 Culture, rights, the African Children's Charter and the omnipresence of change**

It may be stated that two ideas are at the heart of the African Children's Charter. The need to protect the rights and welfare of the child and at the same time preserve the cultural integrity of the communities that subscribe to the normative order prescribed by the Charter. Now, this preoccupation with rights and culture is not peculiar to the African Children's Charter. A striking feature within the contemporary analysis of human rights is the increasing deployment of the rhetoric of culture *and* rights. However, constructions of 'culture' and 'rights' as analytic tools for the understanding of human rights has important implications on how rights talk is ultimately structured. The reason for this is that although rights and culture have emerged as key words in contemporary rights debates, their relationship to each other, both historically and in contemporary analysis, has been conceived in quite variable

ways. In this regard, it is important to note that a significant proportion of mainstream analysis has promoted an understanding of culture which may be described as essentialist. According to this, groups are defined by distinctive cultures that are discrete, internally homogenous, clearly bounded and with relatively fixed repertoires and values.<sup>2</sup> Such a rendering of culture and social groups birthed relativism as a moral perspective and seems to pour cold water on any attempts to prescribe any universal standards. Rights, on the other hand, are understood as a uniquely western idea, transcending from the classic Enlightenment conceptions of the Rights of Man which emerged in Europe and applied only to individuals. The implication of this understanding of rights and its focus on the individual is that human rights, including children's rights are not particularly well-suited for the so-called communitarian and consensual communities of the South.

Not surprisingly, therefore, the initial formulation between rights and culture has been one of opposition. Recognition of rights was seen to entail the denial, rejection or overriding of culture; and conversely, recognising culture was seen to prohibit the pursuit of individual rights. As I demonstrated in chapter two, the binary opposition between these two paradigms has been played out to great effect by a fundamental tension between on the one hand, the desire to establish universal rights, and on the other hand, the awareness and respect for cultural difference. The schism between these different paradigms seems to negate the possibility of finding common ground on which to base such rights. Consequently, even the most serious interventions on rights and culture invite us to make a choice between universalism and cultural relativism. A cursory reading of the Charter's 'culture provisions' seems to encourage this oppositional understanding of culture and rights. For example, article 1(3) of the Charter provides:

3. Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.

Whilst article 21 states:

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<sup>2</sup> See generally R Brightman 'Forget culture: Replacement, transcendence, relexification (1995) 10 *Cultural Anthropology* p 509.



1. State parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:
  - (a) those customs and practices prejudicial to the health or life of the child; and
  - (b) those customs and practices discriminatory to the child on the grounds of sex or other status.
2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be eighteen years and make registration of all marriages in an official registry compulsory.

One implication of these provisions is that the African Children's Charter is anti-culture. However, such a conclusion cannot be correct given the Charter's insistence that its source of inspiration is African tradition and values. In addition, such a rendering of children's rights can only be sustained by an essentialist rendering of culture which as will be seen below, is inadequate to explain the relationship between culture and rights. Consequently, there is need for a different explanation relating to the relationship between culture and the African Children's Charter.

Competing claims of universalism and relativism have been extensively debated and it is and it is generally agreed that the debate has reached an impasse. It is not that cultural difference as such has disappeared. Many examples that were used to make the case for or against universalism and relativism still exist. For example, many Lomwe parents still claim the right to physically discipline their children and many Lomwe girl children perceive their role within the family as subordinate to that of their male siblings. Yet it is undoubtedly erroneous to represent situations such as these as examples of competing claims between culture and rights or between universalism and relativism. The evidence from my conversations about children and childhood in Ndalama and Magombo village reveals the need for a new discursive framework that moves the debate beyond relativism and universalism. The recognition of the inadequacy of universalism and relativism as analytic tools for describing the role of human rights in social relationships has encouraged a reassessment of the conceptualisation of both culture and rights.

Over the past few years, both the concepts of culture and rights have undergone significant transformation. With regard to the concept of human rights, its conception has fundamentally shifted from its liberal precursor which focused on civil and political rights to an expanded notion of collective, cultural and social and economic rights. Whilst the present system of human rights protection may trace its roots to the radical French revolutionary thought at the end of the eighteenth century; by the beginning of the twenty first century, the human rights system had become the pre-eminent language of social justice everywhere in the world. Through the work of international organisations such as the UN and the AU as well as an overwhelming number of non-governmental organisations, the sheer scope of human rights has expanded immensely.<sup>3</sup> These agents of the international civil society have contributed to the formation of a new legal edifice for human rights through the various options for legal development available under international law.<sup>4</sup> International teams of experts assembled by states and international organisations have creatively developed substantive treaty texts and invented implementation and monitoring mechanisms which have been ratified to by states thereby allowing outside institutions to monitor and censure state behaviour. Even countries whose citizens are said to hold values that are different from the ideological basis of human rights have been very active in norm setting.

The African Children' Charter is a perfect example of this multicultural and multi-polar process of norm-setting. An international team of experts assembled by African Network for the Prevention and Protection against Child Abuse and Neglect was mandated by the UN to produce a document which would protect the rights and welfare of the African child. The resulting document combined international developments in child rights with a distinct African ethos thereby not only confirming the African child's place as a rightful citizen within the global community but also infusing the relentless match of human rights with important African considerations.

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<sup>3</sup> See generally, ME Keck & K Sikkink *Activists beyond borders: Advocacy networks in international politics* (Ithaca, New York: Cornell University Press 1998).

<sup>4</sup> See generally B de Sousa Santos *Toward a new common sense: Law science and politics in the paradigmatic transition* (New York: Routledge, 1995).

Another aspect of the changing nature of human rights is well demonstrated by the sheer expansion of the human rights corpus. Originally focusing on the protection of individual civil and political rights; human rights have shifted to include the economic, social and cultural rights which guarantee essential human welfare entitlements such as food, water, shelter and health. The framework has expanded to guarantee group rights such as the right to self-determination; the right to development; the right to a healthy environment; minority and indigenous rights as well as cultural rights. Although the acceptance of these various rights by different polities across the globe is not uniform; the very fact of their recognition as valid principles of human rights speaks volumes about the adaptability of human rights. Even culture, which not more than fifty years ago was viewed as being in opposition to human rights and not as important, is itself now a human right.

The quest for social justice has seen the development of specialised rights frameworks for particularly vulnerable sections of society such as women, children, refugees, and minorities to name but a few. Thus the various forces that have shepherded the human rights corpus along the tortuous tracks of human needs have enabled the construction of a framework that is not only flexible and responsive but also pluralised and multivocal. Instead of being bestowed by God and discovered by Reason, human rights have become the tool for fulfilling the dignity of many individuals and groups across the world. As the human rights has expanded and evolved to meet new and sometimes conflicting challenges, its content, character and procedures have been altered, refined and supplemented.

The Charter reacts to the situation of African children and the context of their particular environment. It proudly proclaims African culture and civilisation as the basis of the rights and welfare of the child; and upon this foundation, builds a structure of normative protections that are clearly inspired by the international framework for the protection of children's rights. The Charter adds both substantive and procedural innovations to the ever-evolving human rights framework. Its rendering of the place of culture in human rights protection and the inclusion of children's duties as well as the provision of a binding enforcement mechanism are all important milestones in children's rights protection.

As the understanding of what human rights are has changed, so has the contemporary understanding of culture. Anthropological renditions of culture have shifted from the colonial understanding of culture as integrated, harmonious, consensual and self-contained to more organic constructions that regard the concept as characterised by ambiguous boundaries, fluidity, internal contestation and interconnectivity. Early 'scientific' understandings of culture gave us Darwin-inspired constructions that posited culture along a continuum of civilised and primitive peoples. The primitive natives, which often was code for non-white races, were described as being defined by their unchanging lives which were enmeshed in cultural observations that had been practised for thousands of years. However, more nuanced analysis of culture through the expansion of cultural studies, and the analysis of globalisation from different cultural perspectives; have resulted in the questioning of old prejudices and the construction of more realistic understandings of culture and its role in people's lives. Culture is now understood as historically produced rather than static; unbounded rather than bounded and integrated; contested rather than consensual; incorporated within the structures of power; and rooted in practices, symbols, habits and patterns of rationality within cultural categories rather than any simple blind allegiance to accepted patterns; and negotiated and constructed through human action rather than through unexplained or unexplainable superstructural forces.

This understanding of culture, much in the same way as the changing conception of rights has important consequences for the African Children's Charter and its relationship to culture. Thus, although the Charter does not spell out its conception of culture; it can be correctly argued that the version of African culture and traditions which it presents do not denote a monolithic and unchanging entity that lords over all African peoples. This is clearly the case because African culture and civilisation refers to a disparate collection of practices and observations of a multitude of African peoples from the San peoples of the Kalahari to the Saharawi of the Sahara; and from the peoples of Timbuktu to Aksum; flowing along patterns of patrilineal, matrilineal, Muslim, Christian, and animist traditions which have been influenced by these cultures' interaction with local, national and international 'cultures'.

Thus, African culture and civilisation is essentially very local yet at the same time very cosmopolitan. It has the ability to carry the old traditions whilst incorporating

change and new ideas. Like the concept of rights, the concept of culture is ever-changing to adapt to new situations and cater for present needs. Consequently change rather than stagnation is the hallmark of the two most important keywords of the framework for the promotion and protection of the rights and welfare of the child.

The African Children's Charter mirrors this multifaceted portrait of culture. It is a testament to the interconnectedness and permeability of cultural symbols and values: it promotes children's rights principles that were developed at international law whilst blending these with local concerns and attitudes. The Charter is, therefore, a transnational, multicultural, cross-cultural and ultimately local framework for addressing concerns relating to the achievement of children's social justice at the local level.

The evidence from Ndalama and Magombo village vindicates the construction of culture and rights presented by the African Children's Charter and in particular the role of change in the face of contemporary challenges. Various institutions within Lomwe communities have had to modify and sometimes even discard their procedures and substantive rules in order to cater for changing circumstances. For example, as the economic relations between individuals have changed from subsistence towards a cash economy; the general purpose of child socialisation has had to shift from merely preparing the younger members of the community for married life to ensuring that they are able to ensure their future economic stability through formal education. It is no longer a cause for embarrassment for girl-children to remain unmarried beyond their teen years and likewise young men who choose to marry later rather than earlier do not attract the sniggers of the village gossip mongers. The chief's court has had to incorporate some non-traditional members in order to cater for 'modern' concerns such as *jenda* whilst the clan committee is becoming more and more aware of the child's *ufulu wolankhula zakukhosi* or 'the child's freedom to speak what is in the throat.' Particular cultural practices have also had to adapt or change. Observations such as *chinamwali* have had to restructure their curriculum in response to concerns about HIV/AIDS resulting in the elimination of practices that were considered as integral to the whole process. Concerns regarding girls' education and HIV/AIDS have caused a dramatic decline on the acceptability of child betrothal.

In all these changes, factors such as Christianity, colonisation, decolonisation, migration, multiparty democracy and the establishment of the NGO industry as a viable economic-cum-philanthropic concern ; to name but a few, have all had varying impacts in the adjustments of the repertoires that Lomwe people use to negotiate through their everyday existence. Similar observations may be made of all African cultures and civilisations that have had to encounter, clash and grapple with other value systems, often in highly asymmetrical relations of domination and subordination. Thus, the African Children's Charter's insistence on African traditions and civilisation should not be construed as a misplaced plea for a romantic rendition of some hegemonic African culture that existed in the past but rather as a testament to the changing nature of both rights and culture and recognition that the two concepts can be used to reinforce and complement each other. For African children, children's rights activists, governments and others involved in children's rights work; the ability of culture and of the children's rights framework to change and adapt represents an opportunity for striving for greater social justice for children.

However, the importance of culture in relation to children's rights does not stop at mediating changes that are conducive for the realisation of the rights and welfare of the child. Culture is the window through which each one of us sees the world. Consequently, it is critical that norms on the rights and welfare of the child must be visible through this window otherwise efforts at prescribing such norms will come to nought.

### **3 Cultural legitimacy and the African Children's Charter**

The relationship between culture and rights may be expressed in three related propositions. Firstly, culture profoundly affects the articulation and implementation of any social standards because of its function and constant influence on human motivation and behaviour. Secondly, while this does not mean that culture is the sole determinant of all human activities, the ability of members of a cultural tradition to take alternative courses of action is conditioned by the broad parameters of their culture. Thirdly, the speed and sustainability of attempts to change in particular ways tends to vary with factors such as the level of entrenchment of the values and

institutions in question; the degree of stability within the society and the ability and willingness of social actors to engage in deliberate strategies for change. The implication of these observations on the rights and welfare of the child is that attempts to raise the quality of protection for children's rights may only be achieved if the norms being proposed enjoy a sufficient level of cultural legitimacy. Cultural legitimacy, as was noted in Chapter 2, denotes the quality of being in conformity with the accepted principles or rules and standards of a particular culture. The defining characteristic of cultural legitimacy is the authority and reverence derived from internal validity. Without this quality, norms are likely not to be respected.

From an analytical point of view, cultural legitimacy may be said to play an important role in the promotion and protection of children's rights in three distinct ways: in the substance of lists of children's rights; in the interpretation of individual rights and in the form in which particular rights are implemented.<sup>5</sup> It is, therefore, critical to ensure that efforts at all these levels of children's rights protection are aimed at achieving universal cultural legitimacy of children's rights norms.

With regard to the development of the substance of lists of children's rights, one way of ensuring that the substance of human rights that these are culturally legitimate is to ensure that the process by which the instruments are drafted is truly inclusive. However, if a culturally inclusive drafting process is to be successful in ensuring universal cultural legitimacy, more is required than mere procedural inclusiveness. There is need that participating actors' views are not only heard but are also taken into account in the development of the final texts.

With regard to the African Children's Charter; it is clear that it lacks the inclusiveness factor as it was drafted by African Union ('AU')- and African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN)-affiliated experts with the assistance of United Nations Children's Fund ('UNICEF'). In a document that is intended to cater for the rights and welfare of children and which trumpets the participation of boys and girls as paramount; there is a distinct absence

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<sup>5</sup> J Donnelly *International human rights* (Boulder, Colorado and Oxford: Westview Press, 1998) p 110.

of children's participation either directly or through grassroots NGOs. A few experts who had the privilege of following the developments relating to the drafting of the Convention on the Rights of the Child<sup>6</sup> managed to get together under the auspices of the AU, ANPPCAN and UNICEF and thrash out a document which addresses the unique situation of the African child. It is quite difficult to make any definitive statements regarding the cultural legitimacy of the Charter based on the drafting process alone. Indeed, it may even be argued that had the process of drafting the African Children's Charter been truly participatory, the character of the document itself may well have been different. This is certainly the case with the children from Magombo and Ndalama village whose priority is access to a good education, adequate food, adequate clothes and secure housing.

Yet, the failure to establish sufficient cultural legitimacy at this early stage of the development of the African Children's Charter is not fatal. There are several examples of human rights instruments that began their lives through an exclusive drafting process as opposed to an inclusive one and today enjoy acceptance by almost all the communities in the world. The Universal Declaration of Human Rights is one such document and the International Covenant on Civil and Political Rights is another. Consequently, it is possible to develop the Charter's legitimacy through other means and secure a more general acceptance of its provisions.

In addressing this deficiency of the Charter, the process of interpretation and implementation may be crucial in ensuring that the standards agreed at the international level are meaningful to local communities. Since the norms contained in the African Children's Charter and indeed in many other human rights instruments are couched at a very general and abstract level; it is possible to interpret them in a way that resonates well with the cultural symbols and repertoires of communities that have subscribed to the Charter's normative prescriptions. Some commentators have singled out this aspect of the Charter as a weakness. They argue that international human rights standards on which universal consensus proves possible are so vague and

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<sup>6</sup> Convention on the Rights of the Child, adopted 20 November 1989 (entered into force 2 September 1990) GA Res. 44/25 (1989), UN Doc. A/RES/44/25 (1989). Text also available in 28 *International Legal Materials* (1989) 1448 and 29 *International Legal Materials* (1990) 1340.



general and subject to such differing interpretation that it is never clear whether or not they have been violated.<sup>7</sup> However, whilst it is certainly true that human rights norms can often be interpreted in many different ways, this is not necessarily a weakness. On the contrary, it presents a further opportunity for ensuring that the process of interpretation and implementation is responsive to the need for cultural contextualisation. In other words, the generality and flexibility of language employed by the African Children's Charter allows each community to interpret the rights and welfare of the child in a manner which is informed by and responsive to its own particular cultural traditions and values. The flexibility allows the abstract values on the rights and welfare of the child to be given a measure of specificity and concreteness in light of particular and relevant needs.

Chapters six and seven demonstrate that it is possible to present many of the Charter's ideas in terms of local symbols and images. The interpretation and translation of the Charter's norms is a crucial part of this process. By portraying children's rights as part of local language, the process of translation demystifies their essence and puts them on par with commonly accessible rule regimes such as those relating to land use or water use, for example. Consequently, *ufulu wa ana* or children's rights is no longer the preserve of the members of an *alendo* or stranger elite, often NGO- or government-related; who come from outside the village and lecture on the rights and welfare of the child. Rather, *ufulu wa ana* becomes a discourse that is locally grounded and capable of expression in local and familiar terms. This process of appropriation of international children's rights norms has the capacity to secure the cultural legitimacy of children's rights. Obviously, as was demonstrated in chapter six, the level of acceptance will vary from norm to norm but articulation in local symbols gives those aiming to secure greater respect for children's rights a very good starting place

Similarly, implementation methods and processes must also enjoy a high degree of legitimacy for them to be effective. As chapter seven demonstrated, it is possible to supplement the formal implementation mechanisms with locally-based institutions and processes. Again, the familiarity that accompanies the activities of these home-

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J Tilley 'Cultural relativism' (2000) 22 *Human Rights Quarterly* p 501 at p 514.

grown institutions and processes provides a greater chance of raising the cultural legitimacy of children's rights than systems that have been bequeathed from the outside.

In a nutshell, then, the African Children's Charter's call for a regime of the rights and welfare of the child that is inspired by African traditions and civilisation must be construed as an appeal for the localisation of the Charter's norms and processes. Such an approach is capable of transforming children's rights talk from being the preserve of the knowledgeable few into a force that positively impacts on children's welfare and social justice concerns everyday. However, despite the positive synergy that emanates from the 'culturalisation' of children's rights, it must also be borne in mind that the process is not so straightforward. Maintaining an awareness of this dynamic at all times will greatly assist in planning interventions aimed at raising the cultural legitimacy of children's rights.

#### **4 Cultural appropriation and the African Children's Charter**

The process of local appropriation of outside norms is uncertain, governed in part by similarities in underlying cultural logics and characterised by the incremental nature of change. The appropriation of children's rights norms follows a similar pattern. Although many of the norms on the rights and welfare of the child may be traced to western philosophy, they are now being appropriated around the globe by many different peoples and being transformed in various and varying ways in different locations. Twenty years ago, the phrase *ufulu wa ana* that would have meant very little in Magombo and Ndalama village. Presently, however, it is a buzzword employed by the children of the two villages when demanding that their rights be respected. It is a phrase whose meaning is now understood by parents, teachers, local authorities and others involved with children. Considering the early associations of children's rights with disrespect of elders and the general decay of societal morals, it is nothing short of amazing that now the concept has evolved from being a threat against parental authority and community stability to an acceptable call for the realisation of children's social justice.

Because of the very nature of culture and cultural legitimacy, the process of appropriating norms on the rights and welfare of the child transforms both the existing cultural understandings as well as the rights themselves. The process is inexact and will seldom yield perfect solutions. For example, the meaning of child and childhood in Lomwe society, as well as the implications of the recognition of such status entails has been fundamentally transformed because of discourse relating to *ufulu wa ana*. Yet, the old considerations relating to coming of age and loss of childhood still exist side by side with the new perspectives, befuddling the category of persons entitled to be regarded as children. Similarly, children's participation rights have had to contend with a negative association with discourtesy although this is slowly changing. The last word on who is a courteous child and what 'the right of the child to speak what is in its throat' is yet to be written.

Yet, cultural appropriation is precisely what brings children's rights home. It allows children's rights talk to be presented in familiar terms and images, thereby allowing the local and grounded justification for their protection. For example, the various explanations for non-discrimination that were discussed in chapter six demonstrate the power of familiar elucidation. Consequently, the challenge for those involved in children's rights work is to recognise the strengths and weaknesses of cultural appropriation; to work with the imprecision and lethargy of cultural appropriation in ensuring that children's rights discourse continues refining the new understandings, constantly striving for greater legitimacy of children's rights norms.

## **5 The African Children's Charter in practice**

Perhaps the most important lesson from this study is that the provisions of the African Children's Charter are ultimately about influencing the child rearing practices of African families with a view towards improving children's general welfare. The purpose of the many rules regarding specific aspects of child survival and development is not to ensure the presence of child-friendly laws on the statute books or to enable sharp-suited delegations to present the state of their child law before important committees. Rather, it is to ensure that the preconditions for children to achieve their dignity and realise their full potential are satisfied and that they continue to be met as the children grow up.

The fieldwork demonstrates that in attempting to achieve these ideals, there is need to pool together the strengths of many constituencies starting with the children themselves, families, non-governmental organisations, local authorities, national governments, as well as intergovernmental agencies. In line with the Lomwe adage that ‘it takes the whole village to raise a child’, it is critical that as many stakeholders as possible contribute towards securing the cultural legitimacy of the African Children’s Charter within the communities that have subscribed to its normative prescriptions.

In the subsequent analysis, I make a few suggestion on how this may be achieved.

## 5.1 Dissemination

The prescriptions about the rights and welfare of the child are agreed at the international level. There is, therefore, a need to transfer knowledge about such prescriptions from the international level to the local. The general conclusion from Ndalama and Magombo villages is that issues relating to *ufulu wa ana* or children’s rights are generally known. However, as in any locality, the extent and quality of such knowledge varies greatly. Some people, including public officials and local authorities, have vague or no knowledge about children’s rights whilst others are able to comfortably articulate the various principles of children’s rights. The reasons for these variations are many. They include, among others, factors such as inaccessibility of information, differences in quality of information, disinterest in community affairs. According to Mai Nahipa, there is a need for continuing dissemination of information relating to the rights and welfare of the child to combat the causes of these variations and ensure that the standard of knowledge is improving all the time.

The more children and their parents know about the prescriptions of the African Children’s Charter, the easier it will be to ensure that such prescriptions are observed. Thus the availability of information on the rights and welfare of the child has a direct impact on the quality of protection that children receive. However, poor access to information is a general problem for many African communities and is not merely restricted to the dissemination of children rights. There is, therefore, a need for

improving the situation by making interventions that not only alter the general situation but also ensures that information on the prescriptions laid down by the African Children's Charter is made available to communities.

As has been argued elsewhere, the packaging of such messages must be done in a culturally appropriate manner so that it strikes a positive chord within the communities involved. For example, since a considerable number of people in Lomwe country cannot read, it is futile to keep distributing flyers and other information packs to such an audience. In the words of John Mbewe, proffering such information sometimes borders on disrespect and the information 'just ends up in the fire' as material is used as tinder for kitchen fire. Consequently, it is critical to ensure that information gets to the intended audience in a usable form.

Effective information access systems combine various modes of information delivery in order to reach different categories of the target audience. Thus, messages to children, adults, local officials, lawyers and others must be presented in a manner that is suitable for each audience. Obviously, information delivery options for some individuals will overlap as the individuals concerned occupy different roles in society. The important consideration, however, is that the information filters through. Village head Ndalama gave me an example of the now defunct agricultural extension service that was run by the Malawi government during the rule of Dr Banda. The village head observed that information on farming techniques was delivered through a combination of radio shows, print media, drama shows and *kanema* or motion pictures. According to Village head Ndalama, whilst the radio and the monthly magazines did their part; *kanema* was the most popular since it also acted as a form of entertainment:

Even the laziest people in the village, those who had not been seen with anyone's hoe for years came to the *kanema*. The popularity of this mode of delivery meant that messages relating to modern farming methods got to the people.

A key element for the success of the extension system was in ensuring that information came to the people and not the other way round. If information relating to the rights and welfare of the child is to be distributed effectively, it is necessary to bring it to the targeted audience in a manner which they will find easy to use.

Difference in the quality of the information delivered is also another important matter that requires attention. The proliferation of NGOs working in social welfare and on the rights of the child has helped raise the cultural profile of the rights and welfare of the child. However, differences in their approaches also results in differences in the quality of information delivered. Whilst it is difficult to eradicate this problem, it is critical to ensure that workers in child rights aim to deliver consistently high quality information. One way of moving towards this is for government, NGOs, and other stakeholders to agree on common source documents; which is not the case at the moment. Thus, with regard to translations of the African Children's Charter, one finds a 'government version'; a 'UNICEF version'; and a version distributed by Plan International. Whilst their content is largely similar, there are some uses of local language that have an impact on the general meanings. Additionally, some translations insist on sticking to the English sources so much that the result is an uncomfortable or unfamiliar usage of local language much like the *Chichewa* version of the Christian Bible which reads like a King's James version of sorts. Such deployment of language restricts, instead of aiding, access to information. Simplicity and accuracy should, therefore, be the hallmark of information dissemination.

Another factor which was pointed out during the fieldwork as contributing to the variations in knowledge of the rights and welfare of the child relates to disinterest in the subject matter by parents, children and local officials. Consequently, it is necessary to organise modes of information delivery that improve the attraction of the rights and welfare of the child. In this regard, some observations made by Village head Ndalama are also pertinent. As we chatted about *kanema* and village life generally, he pointed out that generally people, especially the younger ones, do not like to sit and be lectured to. His own regular meetings attested to this theory for it is usually the *gogos* or elders of the village that attend even when the matters being discussed affected the younger citizens more. Consequently, he advises that it is important to 'throw something in there' that stirs up interest. Thus, general meetings at the chief's court will have at some stage, a choral or drama performance or a recital. According to the Village head:

The message will be about AIDS or the need for a new school block which could have been said in a few words. The important thing is that it will have been heard by more people.

Thus, children's rights workers need to be aware of the need to maintain their audience's interest. Ulendo Arts Group whose members come from both Magombo and Ndalama village know a few things about maintaining the interest of their audience. The group has worked on a few collaborations with Mai Nahipa, the children's rights expert from Ndalama village and come up with a novel way of delivering information on the rights and welfare of the child. The group's performances are a gripping combination of recital, music, straight acting and role-play. The last attribute involves the co-optation of members of the audience into a structured play. When mother becomes daughter; grandfather becomes student; and boy becomes chief; the result is a compelling rendition of the importance of the rights and welfare of the child seen not only from the perspective of the actors but also local people involved and in particular the children. Such a presentation keeps the rights talk interesting and accessible. It is no longer the stuff of experts but rather the concern of everyone, including the grade four girl skipping along on her way to school.

However, as can be garnered from the above, developing a sustained program for the dissemination of ideas on the rights and welfare of the child is a very onerous task. It is a task that cannot be left solely to the government, NGOs or local activists. There is therefore a need for systematic and sustained collaboration between these related constituencies.

## **5.2 Collaboration**

Families, government, NGOs, inter-governmental institutions and academics that are involved in work relating to the rights and welfare of the child are all united in the achievement of one aim: and that is the protection of the dignity of each individual child. The efforts of these various partners are different due to the nature of their mandates and competencies. Sometimes, the result is a disjointed approach that does not raise the cultural profile of children's rights. A good example of this is the haste in

which make African governments have rushed to enact European-styled laws in a bid to fulfil their obligations under the CRC or the African Children's Charter. Whilst this is commendable in that it provides a local framework for enforcing the claims of children's rights, it often does not translate into a general awareness of the rights and welfare of the child. Consequently, still more needs to be done to ensure that families observe the rights and welfare of the child in their child-rearing repertoires.

Similarly, academics often find it more convenient to write exposes about the rights and welfare of the child from the comfort of their offices. Their engagement with the reality of children is often limited to age-old typologies about the structure of the African family being the bane of protection or oppression (depending on which books one has read). Such engagement is then extrapolated into articles and books suggesting ways in which to properly achieve the realisation of children's rights. Now, it must be stressed that there is a place for pure research; deconstructing and reconstructing as it does, our conceptual understanding of issues related to children's rights. However, a proper assessment of the needs of children and how to address those needs can only be secured if theoretical and desk research is complemented by contributions from others who work directly with children and are well apprised with the situation obtaining on the ground. As the local saying goes: *chala chimodzi sichiswa nsabwe* (One finger does not kill a louse),<sup>8</sup> there is therefore a need to bring in the knowledge of children's rights researchers and practitioners. Such an approach can only be better for raising the cultural legitimacy of children's rights.

Collaboration between various levels of societal institutions and individuals has several benefits. Firstly, it ensures that scarce resources are deployed with maximum return. Take for example, the collaboration between Mai Nahipa and Ulendo Arts Group. Their partnership resulted in the production of a unique offering which neither party could have achieved on their own. Mai Nahipa, relying on her daily experiences as a child rights worker, raised the issues that needed to be tackled. Ulendo Arts Group, being the stage maestros that they are, were able to turn this into a series of performances involving recitals, dance, music, poetry and drama. Children's rights may not have been their forte but the involvement of someone knowledgeable

<sup>8</sup>

Or its variant *chiswe chimodzi sichiumba chulu* (One termite cannot build an ant-hill).



eliminated this deficiency. Although this is a somewhat simple example, the result of collaboration between significant players such as government and the local community could see the development of innovative approaches to children's rights protection; approaches which deviate from the standard 'let us pass some UNICEF - sponsored laws' reaction.

Collaboration also enables the discovery of innovative solutions to problems. An excellent example of this relates to the fusion of formal and informal procedures in the structure of *kumphasa* dispute relation mechanisms. The local administrators' engagement with local customs and observations enabled the structuring of an institution that is structured in local terms but enjoying the deference of formal institutions. Similar achievements are possible in the area of the rights and welfare of the child.

Thirdly, collaboration makes it possible to have audits whether particular interventions are effective or whether particular areas of children's rights are being left out. For example, Mai Nahipa bemoaned the government's preoccupation with the criminal justice elements of children's rights when the important matters remained the violation of many children's socio-economic rights. In her view, if government had asked around, it would have learnt that it was important to ensure that children had been fed and that they were protected from the impact of HIV/AIDS. If this was done, maybe the government would not have to bother about criminal justice. Indeed, many of my conversations in Ndalama and Magombo village showed access to education, food, clothes and shelter as the pressing concerns of many children. The absence of these necessities due to family incapacity or the absence of family made many children sad. The failure by government to function collaboratively with children and others on the ground has resulted in the skewed deployment of resources towards criminal justice when the provision of social assistance ought to have been the priority. Since local organisations and locally based individuals have a much better understanding of the situation pertaining on the ground, it is better for NGOs and government to collaborate with them for more effective programming.

Most importantly, however, collaboration encourages a sense of ownership; an acceptance that children's rights talk is 'about us'. In this regard, it is essential that the participation of children and their families is sought at all levels of intervention.

### **5.3 Participation**

During my conversations about the rights and welfare of the child, I was struck by the level of awareness demonstrated by the children of Magombo and Ndalama villages. They were able to clearly articulate their needs and wants as well as their entitlements and duties within their families. Unfortunately, the views of most of these children are left untapped due to the various reasons that were explored in chapter six. Similarly, many parents and guardians felt that their input towards the development of legal and policy frameworks for the rights and welfare of the child were not sought or valued by both government and NGO groups. The denial of concrete opportunities for participation creates the perception that children's rights talk is a language of the few and only serves to alienate many capable individuals from the process of 'culturalising' children's rights.

In contrast, allowing children and their parents to participate in structuring the agenda for children's rights has the effect of empowering families and communities to take on the challenge of promoting and protecting the rights and welfare of the child. Parents no longer see children's rights discourse as a conspiracy drawn up by misguided government types intended to spirit away their authority over children; and children learn to develop the kind of self-confidence that any nation would require of its future leaders.

Indeed there are many obstacles to achieving effective participation in the realm of children's rights protection. However, there are various practical steps that may be undertaken to improve the situation. Identifying these possibilities may itself involve the participation of local communities. Children and their families are aware of the interventions that work and those that are doomed to fail. Government, academics and NGOs would do well to ask local partners before coming up with creative solutions.

One solution that was suggested during the fieldwork is the expression of children's rights norms in local terms. As was observed above dissemination in local languages creates opportunities for participation in a universal discourse on local terms. It creates space for critiquing many assumptions about various cultural observations and their relationship to children's rights norms. The presentation of children's rights norms in accessible terms enables people like Yaya to point out that these issues about *ufulu wa ana* 'are not new. It actually is 'what we have been doing all along.' Expressing similar sentiments, Wilfred Moyenda of Ulendo Arts Group, observes that the presentation of children's rights issues in local terms has enabled his group engage more usefully with the concepts. In this regard, he points out that Ulendo Arts is able to present the issues with narrations based on local experience thereby stressing the importance and relevance of the children's rights regime.

Another way of enhancing participation is through engagement with local institutions. Since parents and their children organise their lives around various social institutions such as schools, hospitals, churches, mosques, local government, and others; co-opting these institutions into the children's rights agenda ensures that individuals running such institutions play a meaningful role in children's rights protection. Encouraging everyone to be a defender of children's rights whilst exercising their usual roles as mother, teacher, village head, or whatever role it is, has better prospects of achieving the realisation of children's rights than does the mere repetition of the African Children's Charter in domestic legislation. Obviously, achieving this level of participation in children's rights issues is not easy but it is certainly a goal worth striving for.

#### **5.4 Innovation**

Ultimately, the African Children's Charter is a legal document. Its text is therefore capable of being subjected to all the tools of legal analysis and interpretation. However, unlike a technical legal document such as a contract or a maritime treaty, the African Children's Charter seeks to regulate personal aspects of people's daily lives by contributing to the manner in which African children are raised. Consequently, an approach that merely involves sitting down and dismantling the legal text may not achieve the realisation of the rights and welfare of the child.

Instead, it is critical to ensure that interpretation and implementation efforts focus on the Charter's singular purpose: the protection of the dignity of the African child.

There is, therefore, a need for new innovative approaches in the research, analysis, interpretation and implementation of the rights and welfare of the child. Such new approaches must not only go beyond legal transplantation but also take into account the Charter's particular focus on context, culture and cultural legitimacy. Whilst international law methods are effective at teasing out the contents and implications of the African Children's Charter, the adoption of a multidisciplinary approach in the research and analysis of the rights and welfare of the child will certainly provide a more contextually appropriate methodology that mirrors children's multiple locations within different communities.

The involvement of varied disciplines in children's rights work ought not be restricted to academia but must be actively pursued at all levels of children's rights work and by all manner of children's rights workers both within the private and public domain. Engagement with such multidisciplinary approaches must be developed and encouraged at the international, national and local levels. Institutions and individuals involved in child rights work at all these levels will need to deal with the implications of culture on children's rights and to fashion solutions that uphold children's rights whilst at the same time respecting the cultural background that sustains those rights. For example, the African Children's Committee needs to go beyond replicating the work and methodologies that have been employed by the Committee on the Rights of the Child and fashion responses aimed at grounding children's rights in local cultural practice. Similarly, state parties to the Charter need to go beyond the enactment of 'comprehensive children's rights statutes' and consider how respect for children's rights could be made not just a part of formal law but also, and more importantly, a part of every day child rearing practice.

More importantly, however, there is need for those who are tasked with implementing the Charter at the regional or national level to recognise and engage the potential of local knowledge bases, local agents and local institutions in the protection and promotion of the rights and welfare of the African child. Fusing global children's rights imperatives with appropriate local arrangements and understandings serves to

imbue the whole children's rights framework with familiarity, relevance and legitimacy. It literally brings children's rights home.

## **6 Concluding remarks**

The African Children's Charter affords a platform for addressing the human rights concerns of African children. It does so in a manner that is not only in keeping with current developments at international law but also sympathetic to local context. Although the Charter is not a panacea to the many problems that African children face, it offers the possibility of creating innovative solutions that could alleviate a great number of those challenges. The challenge for African governments, national institutions and civil society organisations involved in child work is to unlock the Charter's potential and bring its many benefits to African children and their families by not only working on its existing legitimacy but also consciously extending such legitimacy. The collaboration, participation and innovation of all involved in child work including children themselves is key to developing a framework for the rights and welfare of the child that is not only effective but also acceptable. Unless children's rights are brought into the homes of African children, they will remain paper rights, with no significant contribution towards securing the dignity of African children.

## Appendix A

### African Charter on the Rights and Welfare of the African Child

#### Preamble

The African Member States of the Organization of African Unity, Parties to the present Charter entitled 'African Charter on the Rights and Welfare of the Child',

**CONSIDERING** that the Charter of the Organization of African Unity recognizes the paramountcy of Human Rights and the African Charter on Human and People's Rights proclaimed and agreed that everyone is entitled to all the rights and freedoms recognized and guaranteed therein, without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status,

**RECALLING** the Declaration on the Rights and Welfare of the African Child (AHG/ST.4 Rev.1) adopted by the Assembly of Heads of State and Government of the Organization of African Unity, at its Sixteenth Ordinary Session in Monrovia, Liberia, from 17 to 20 July 1979, recognized the need to take appropriate measures to promote and protect the rights and welfare of the African Child,

**NOTING WITH CONCERN** that the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs special safeguards and care,

**RECOGNIZING** that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding,

**RECOGNIZING** that the child, due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security,

**TAKING INTO CONSIDERATION** the virtues of their cultural heritage, historical background and the values of the African civilization which should inspire and characterize their reflection on the concept of the rights and welfare of the child,

**CONSIDERING** that the promotion and protection of the rights and welfare of the child also implies the performance of duties on the part of everyone,

**REAFFIRMING ADHERENCE** to the principles of the rights and welfare of the child contained in the declaration, conventions and other instruments of the Organization of African Unity and in the United Nations and in particular the United Nations Convention on the Rights of the Child; and the OAU Heads of State and Government's Declaration on the Rights and Welfare of the African Child.

## **HAVE AGREED AS FOLLOWS:**

### **PART 1: RIGHTS AND DUTIES**

#### **CHAPTER ONE: RIGHTS AND WELFARE OF THE CHILD**

##### **Article 1: Obligation of States Parties**

1. Member States of the Organization of African Unity Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake to the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.
2. Nothing in this Charter shall affect any provisions that are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in that State.
3. Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.

##### **Article 2: Definition of a Child**

For the purposes of this Charter. a child means every human being below the age of 18 years.

##### **Article 3: Non-Discrimination**

Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

##### **Article 4: Best Interests of the Child**

1. In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

2. In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings. and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

#### **Article 5: Survival and Development**

1. Every child has an inherent right to life. This right shall be protected by law.
2. States Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child.
3. Death sentence shall not be pronounced for crimes committed by children.

#### **Article 6: Name and Nationality**

1. Every child shall have the right from his birth to a name.
2. Every child shall be registered immediately after birth.
3. Every child has the right to acquire a nationality.
4. States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.

#### **Article 7: Freedom of Expression**

Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws.

#### **Article 8: Freedom of Association**

Every child shall have the right to free association and freedom of peaceful assembly in conformity with the law.

#### **Article 9: Freedom of Thought, Conscience and Religion**

1. Every child shall have the right to freedom of thought conscience and religion.



2. Parents. and where applicable, legal guardians shall have a duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and best interests of the child.

3. States Parties shall respect the duty of parents and where applicable, legal guardians to provide guidance and direction in the enjoyment of these rights subject to the national laws and policies.

## **Article 10: Protection of Privacy**

No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.

## **Article 11: Education**

1. Every child shall have the right to an education.

2. The education of the child shall be directed to:

(a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples' rights and international human rights declarations and conventions;

(c) the preservation and strengthening of positive African morals, traditional values and cultures;

(d) the preparation of the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all peoples ethnic, tribal and religious groups;

(e) the preservation of national independence and territorial integrity;

(f) the promotion and achievements of African Unity and Solidarity;

(g) the development of respect for the environment and natural resources;

(h) the promotion of the child's understanding of primary health care.

3. States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular:

- (a) provide free and compulsory basic education;
- (b) encourage the development of secondary education in its different forms and to progressively make it free and accessible to all;
- (c) make the higher education accessible to all on the basis of capacity and ability by every appropriate means;
- (d) take measures to encourage regular attendance at schools and the reduction of drop-out rates;
- (e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.

4. States Parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose for their children's schools, other than those established by public authorities, which conform to such minimum standards may be approved by the State, to ensure the religious and moral education of the child in a manner with the evolving capacities of the child.

5. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is subjected to schools or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter.

6. States Parties to the present Charter shall have all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability.

7. No part of this Article shall be construed as to interfere with the liberty of individuals and bodies to establish and direct educational institutions subject to the observance of the principles set out in paragraph I of this Article and the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the States .

## **Article 12: Leisure, Recreation and Cultural Activities**

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to fully participate in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

### **Article 13: Handicapped Children**

1. Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community.

2. States Parties to the present Charter shall ensure, subject to available resources, to a disabled child and to those responsible for his care, of assistance for which application is made and which is appropriate to the child's condition and in particular shall ensure that the disabled child has effective access to training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development.

3. The States Parties to the present Charter shall use their available resources with a view to achieving progressively the full convenience of the mentally and physically disabled person to movement and access to public highway buildings and other places to which the disabled may legitimately want to have access to.

### **Article 14: Health and Health Services**

1. Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.

2. States Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures:

(a) to reduce infant and child mortality rate;

(b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) to ensure the provision of adequate nutrition and safe drinking water;

(d) to combat disease and malnutrition within the framework of primary health care through the application of appropriate technology;

(e) to ensure appropriate health care for expectant and nursing mothers;

(f) to develop preventive health care and family life education and provision of service;

(g) to integrate basic health service programmes in national development plans;

(h) to ensure that all sectors of the society, in particular, parents, children, community leaders and community workers are informed and supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of domestic and other accidents;

(i) to ensure the meaningful participation of non-governmental organizations, local communities and the beneficiary population in the planning and management of a basic service programme for children;

(j) to support through technical and financial means, the mobilization of local community resources in the development of primary health care for children.

### **Article 15: Child Labour**

1. Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development.

2. States Parties to the present Charter take all appropriate legislative and administrative measures to ensure the full implementation of this Article which covers both the formal and informal sectors of employment and having regard to the relevant provisions of the International Labour Organization's instruments relating to children, States Parties shall in particular:

(a) provide through legislation, minimum wages for admission to every employment;

(b) provide for appropriate regulation of hours and conditions of employment;

(c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of this Article;

(d) promote the dissemination of information on the hazards of child labour to all sectors of the community.

### **Article 16: Protection Against Child Abuse and Torture**

1. States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental

injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.

2. Protective measures under this Article shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting referral investigation, treatment, and follow-up of instances of child abuse and neglect.

#### **Article 17: Administration of Juvenile Justice**

1. Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.

2. States Parties to the present Charter shall in particular:

(a) ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment;

(b) ensure that children are separated from adults in their place of detention or imprisonment;

(c) ensure that every child accused in infringing the penal law:

(i) shall be presumed innocent until duly recognized guilty;

(ii) shall be informed promptly in a language that he understands and in detail of the charge against him, and shall be entitled to the assistance of an interpreter if he or she cannot understand the language used;

(iii) shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence;

(iv) shall have the matter determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal;

(d) prohibit the press and the public from trial.

3. The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation.

4. There shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.

### **Article 18: Protection of the Family**

1. The family shall be the natural unit and basis of society. it shall enjoy the protection and support of the State for its establishment and development.
2. States Parties to the present Charter shall take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the even of its dissolution. In case of the dissolution, provision shall be made for the necessary protection of the child.
3. No child shall be deprived of maintenance by reference to the parents' marital status.

### **Article 19: Parent Care and Protection**

1. Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child.
2. Every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis.
3. Where separation results from the action of a State Party, the State Party shall provide the child, or if appropriate, another member of the family with essential information concerning the whereabouts of the absent member or members of the family. States Parties shall also ensure that the submission of such a request shall not entail any adverse consequences for the person or persons in whose respect it is made.
4. Where a child is apprehended by a State Party, his parents or guardians shall, as soon as possible, be notified of such apprehension by that State Party.

### **Article 20: Parental Responsibilities**

1. Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development the child and shall have the duty:
  - (a) to ensure that the best interests of the child are their basic concern at all times-

(b) to secure, within their abilities and financial capacities, conditions of living necessary to the child's development; and

(c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.

2. States Parties to the present Charter shall in accordance with their means and national conditions take all appropriate measures;

(a) to assist parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing;

(b) to assist parents and others responsible for the child in the performance of child-rearing and ensure the development of institutions responsible for providing care of children; and

(c) to ensure that the children of working parents are provided with care services and facilities.

#### **Article 21: Protection against Harmful Social and Cultural Practices**

1. States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

(a) those customs and practices prejudicial to the health or life of the child; and

(b) those customs and practices discriminatory to the child on the grounds of sex or other status.

2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.

#### **Article 22: Armed Conflicts**

1. States Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child.

2. States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.

3. States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife.

### **Article 23: Refugee Children**

1. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties.

2. States Parties shall undertake to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives or an unaccompanied refugee child in order to obtain information necessary for reunification with the family.

3. Where no parents, legal guardians or close relatives can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason.

4. The provisions of this Article apply *mutatis mutandis* to internally displaced children whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused.

### **Article 24: Adoption**

States Parties which recognize the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall:

(a) establish competent authorities to determine matters of adoption and ensure that the adoption is carried out in conformity with applicable laws and procedures and on the basis of all relevant and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and guardians and that, if necessary, the appropriate persons concerned have given their informed consent to the adoption on the basis of appropriate counselling;

(b) recognize that inter-country adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means



of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) ensure that the child affected by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) take all appropriate measures to ensure that in inter-country adoption, the placement does not result in trafficking or improper financial gain for those who try to adopt a child;

(e) promote, where appropriate, the objectives of this Article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework to ensure that the placement of the child in another country is carried out by competent authorities or organs;

(f) establish a machinery to monitor the well-being of the adopted child.

## **Article 25: Separation from Parents**

1. Any child who is permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance;

2. States Parties to the present Charter:

(a) shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or who in his or her best interest cannot be brought up or allowed to remain in that environment shall be provided with alternative family care, which could include, among others, foster placement, or placement in suitable institutions for the care of children;

(b) shall take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters.

3. When considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious or linguistic background.

## **Article 26: Protection Against Apartheid and Discrimination**

1. States Parties to the present Charter shall individually and collectively undertake to accord the highest priority to the special needs of children living

under Apartheid and in States subject to military destabilization by the Apartheid regime.

2. States Parties to the present Charter shall individually and collectively undertake to accord the highest priority to the special needs of children living under regimes practising racial, ethnic, religious or other forms of discrimination as well as in States subject to military destabilization.

3. States Parties shall undertake to provide whenever possible, material assistance to such children and to direct their efforts towards the elimination of all forms of discrimination and Apartheid on the African Continent.

#### **Article 27: Sexual Exploitation**

1. States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent:

- (a) the inducement, coercion or encouragement of a child to engage in any sexual activity;
- (b) the use of children in prostitution or other sexual practices;
- (c) the use of children in pornographic activities, performances and materials.

#### **Article 28: Drug Abuse**

States Parties to the present Charter shall take all appropriate measures to protect the child from the use of narcotics and illicit use of psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the production and trafficking of such substances.

#### **Article 29: Sale, Trafficking and Abduction**

States Parties to the present Charter shall take appropriate measures to prevent:

- (a) the abduction, the sale of, or traffick in children for any purpose or in any form, by any person including parents or legal guardians of the child;
- (b) the use of children in all forms of begging.

### **Article 30: Children of Imprisoned Mothers**

1. States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:

- (a) ensure that a non-custodial sentence will always be first considered when sentencing such mothers;
- (b) establish and promote measures alternative to institutional confinement for the treatment of such mothers;
- (c) establish special alternative institutions for holding such mothers;
- (d) ensure that a mother shall not be imprisoned with her child;
- (e) ensure that a death sentence shall not be imposed on such mothers;
- (f) the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.

### **Article 31: Responsibility of the Child**

Every child shall have responsibilities towards his family and society, the State and other legally recognized communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty;

- (a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;
- (b) to serve his national community by placing his physical and intellectual abilities at its service;
- (c) to preserve and strengthen social and national solidarity;
- (d) to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society;
- (e) to preserve and strengthen the independence and the integrity of his country;
- (f) to contribute to the best of his abilities. at all times and at all levels, to the promotion and achievement of African Unity.

## **PART II**

### **CHAPTER TWO: ESTABLISHMENT AND ORGANIZATION OF THE COMMITTEE ON THE RIGHTS AND WELFARE OF THE CHILD**

#### **Article 32: The Committee**

An African Committee of Experts on the Rights and Welfare of the Child hereinafter called 'the Committee' shall be established within the Organization of African Unity to promote and protect the rights and welfare of the child.

#### **Article 33: Composition**

1. The Committee shall consist of 11 members of high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child.
2. The members of the Committee shall serve in their personal capacity.
3. The Committee shall not include more than one national of the same State.

#### **Article 34: Election**

As soon as this Charter shall enter into force the members of the Committee shall be elected by secret ballot by the Assembly of Heads of State and Government from a list of persons nominated by the States Parties to the present Charter.

#### **Article 35: Candidates**

Each State Party to the present Charter may nominate not more than two candidates. The candidates must have one of the nationalities of the States Parties to the present Charter. When two candidates are nominated by a State, one of them shall not be a national of that State.

#### **Article 36**

1. The Secretary-General of the Organization of African Unity shall invite States Parties to the present Charter to nominate candidates at least six months before the elections.
2. The Secretary-General of the Organization of African Unity shall draw up in alphabetical order, a list of persons nominated and communicate it to the Heads of State and Government at least two months before the elections.

**Article 37: Term of Office**

1. The members of the Committee shall be elected for a term of five years and may not be re-elected, however. the term of four of the members elected at the first election shall expire after two years and the term of six others, after four years.
2. Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organization of African Unity shall draw lots to determine the names of those members referred to in sub-paragraph 1 of this Article.
3. The Secretary-General of the Organization of African Unity shall convene the first meeting of Committee at the Headquarters of the Organization within six months of the election of the members of the Committee, and thereafter the Committee shall be convened by its Chairman whenever necessary, at least once a year.

**Article 38: Bureau**

1. The Committee shall establish its own Rules of Procedure.
2. The Committee shall elect its officers for a period of two years.
3. Seven Committee members shall form the quorum.
4. In case of an equality of votes, the Chairman shall have a casting vote.
5. The working languages of the Committee shall be the official languages of the OAU.

**Article 39: Vacancy**

If a member of the Committee vacates his office for any reason other than the normal expiration of a term, the State which nominated that member shall appoint another member from among its nationals to serve for the remainder of the term - subject to the approval of the Assembly.

**Article 40: Secretariat**

The Secretary-General of the Organization of African Unity shall appoint a Secretary for the Committee.

### **Article 41: Privileges and Immunities**

In discharging their duties, members of the Committee shall enjoy the privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organization of African Unity.

## **CHAPTER THREE: MANDATE AND PROCEDURE OF THE COMMITTEE**

### **Article 42: Mandate**

The functions of the Committee shall be:

(a) To promote and protect the rights enshrined in this Charter and in particular to:

(i) collect and document information, commission inter-disciplinary assessment of situations on African problems in the fields of the rights and welfare of the child, organize meetings, encourage national and local institutions concerned with the rights and welfare of the child, and where necessary give its views and make recommendations to Governments;

(ii) formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa;

(iii) cooperate with other African, international and regional Institutions and organizations concerned with the promotion and protection of the rights and welfare of the child.

(b) To monitor the implementation and ensure protection of the rights enshrined in this Charter.

(c) To interpret the provisions of the present Charter at the request of a State Party, an Institution of the Organization of African Unity or any other person or Institution recognized by the Organization of African Unity, or any State Party.

(d) Perform such other task as may be entrusted to it by the Assembly of Heads of State and Government, Secretary-General of the OAU and any other organs of the OAU or the United Nations.

### **Article 43: Reporting Procedure**

1. Every State Party to the present Charter shall undertake to submit to the Committee through the Secretary-General of the Organization of African Unity,

reports on the measures they have adopted which give effect to the provisions of this Charter and on the progress made in the enjoyment of these rights:

(a) within two years of the entry into force of the Charter for the State Party concerned: and

(b) and thereafter, *every three years*.

2. Every report made under this Article shall:

(a) contain sufficient information on the implementation of the present Charter to provide the Committee with comprehensive understanding of the implementation of the Charter in the relevant country; and

(b) shall indicate factors and difficulties, if any, affecting the fulfilment of the obligations contained in the Charter.

3. A State Party which has submitted a comprehensive first report to the Committee need not, in its subsequent reports submitted in accordance with paragraph I (a) of this Article, repeat the basic information previously provided.

#### **Article 44: Communications**

1. The Committee may receive communication, from any person, group or non-governmental organization recognized by the Organization of African Unity, by a Member State, or the United Nations relating to any matter covered by this Charter.

2. Every communication to the Committee shall contain the name and address of the author and shall be treated in confidence.

#### **Article 45: Investigations by the Committee**

1. The Committee may, resort to any appropriate method of investigating any matter falling within the ambit of the present Charter, request from the States Parties any information relevant to the implementation of the Charter and may also resort to any appropriate method of investigating the measures the State Party has adopted to implement the Charter.

2. The Committee shall submit to each Ordinary Session of the Assembly of Heads of State and Government every two years, a report on its activities and on any communication made under Article 44 of this Charter.

3. The Committee shall publish its report after it has been considered by the Assembly of Heads of State and Government.

4. States Parties shall make the Committee's reports widely available to the public in their own countries.

## **CHAPTER FOUR: MISCELLANEOUS PROVISIONS**

### **Article 46: Sources of Inspiration**

The Committee shall draw inspiration from International Law on Human Rights, particularly from the provisions of the African Charter on Human and Peoples' Rights, the Charter of the Organization of African Unity, the Universal Declaration on Human Rights, the International Convention on the Rights of the Child, and other instruments adopted by the United Nations and by African countries in the field of human rights. and from African values and traditions.

### **Article 47: Signature, Ratification or Adherence**

1. The present Charter shall be open to signature by all the Member States of the Organization of African Unity.
2. The present Charter shall be subject to ratification or adherence by Member States of the Organization of African Unity. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary-General of the Organization of African Unity.
3. The present Charter shall come into force 30 days after the reception by the Secretary-General of the Organization of African Unity of the instruments of ratification or adherence of 15 Member States of the Organization of African Unity.

### **Article 48: Amendment and Revision of the Charter**

1. The present Charter may be amended or revised if any State Party makes a written request to that effect to the Secretary-General of the Organization of African Unity, provided that the proposed amendment is not submitted to the Assembly of Heads of State and Government for consideration until all the States Parties have been duly notified of it and the Committee has given its opinion on the amendment.
2. An amendment shall be approved by a simple majority of the States Parties.



## Appendix B

### Convention on the Rights of the Child

#### Preamble

The States Parties to the present Convention,

*Considering that*, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

*Bearing in mind that* the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

*Recognizing that* the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

*Recalling that*, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

*Convinced that* the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

*Recognizing that* the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

*Considering that* the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

*Bearing in mind that* the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles

23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children, '

*Bearing in mind* that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth',

*Recalling* the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) ; and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict,

*Recognizing* that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

*Taking due account* of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

*Recognizing* the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

*Have agreed* as follows:

## **PART I**

### **Article 1**

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

### **Article 2**

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

### **Article 3**

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

### **Article 4**

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

### **Article 5**

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

### **Article 6**

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

## Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

## Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

## Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child.

States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

#### **Article 10**

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

#### **Article 11**

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

#### **Article 12**

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

### Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

### Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

### Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

### Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

## **Article 17**

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children's books;
- (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
- (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

## **Article 18**

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

## Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

## Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

## Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
- (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) Ensure that the child concerned by inter-country adoption enjoys



safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

## **Article 22**

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

## **Article 23**

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child. 3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives

education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development

4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

## Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

## **Article 25**

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

## **Article 26**

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

## **Article 27**

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to

international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

## **Article 28**

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

## **Article 29**

1. States Parties agree that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

### **Article 30**

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

### **Article 31**

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

### **Article 32**

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States

Parties shall in particular: (a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

### **Article 33**

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

### **Article 34**

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.

### **Article 35**

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

### **Article 36**

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

### **Article 37**

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

## **Article 38**

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

## **Article 39**

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of

neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

## Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;



(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings. 3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

#### **Article 41**

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

(b) International law in force for that State.

### **PART II**

#### **Article 42**

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

#### **Article 43**

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.

2. The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.
3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.
4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.
5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.
7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.
8. The Committee shall establish its own rules of procedure.
9. The Committee shall elect its officers for a period of two years.
10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the

States Parties to the present Convention, subject to the approval of the General Assembly.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

#### **Article 44**

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights:

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

#### **Article 45**

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

### **PART III**

#### **Article 46**

The present Convention shall be open for signature by all States.

#### **Article 47**

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

#### **Article 48**

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

## Article 49

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession. Article 50

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

## Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General

**Article 52**

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

**Article 53**

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

**Article 54**

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

**IN WITNESS THEREOF** the undersigned plenipotentiaries, being duly authorized thereto by their respective governments, have signed the present Convention.

## Appendix C

### List of some of the questions utilised during fieldwork

#### General

- 1 Who is a Lomwe?
- 2 What is it that makes the Lomwe special? Are the Lomwe any different from other groups, say the Yao from the South, the Chewa from the Centre or the Tumbuka from the North?
- 3 What values hold them together?
- 4 What values are the most important?
- 5 What values do they have in common with other groups?
- 6 What kind of society do the Lomwe have?
- 7 Who holds power in Lomwe society?
- 8 How much authority does indigenous law command?
- 9 Why do the Lomwe obey indigenous law?
- 10 What authority do ancestors have in Lomwe cosmology?
- 11 What are the reasons for belief in ancestors?
- 12 What is the importance of a child
- 13 What are Lomwe institutions?
- 14 Why are these institutions considered important?
- 15 Any further suggestions of what I should ask?

#### Children's rights: basic concepts

- 1 What is a right?
- 2 Are there any concepts of children's rights in Lomwe indigenous law?
- 3 What are these rights?
- 4 Did these rights develop in response to needs and if so what are these needs?
- 5 Are these rights made known to children? Parents?

- 6 Can children claim these rights?
- 7 Who enforces these rights?
- 8 What happens when there is a violation of these rights?
- 9 What are the differences between the rights of children and the rights of adults?
- 10 What are the special needs of Lomwe children?
- 11 What special problems do Lomwe children face?
- 12 Have you heard of children's rights?
- 13 Have you heard of the rules in the Constitution that protect children?
- 14 Have you heard of the African Charter on the Rights and Welfare of the Child?
- 15 Have you heard of the Convention on the Rights of the Child?
- 16 How do you access this information? Does anyone teach or talk about these rights?
- 17 Would you want to know more about these rights?
- 18 Have I forgotten to ask any important questions?

## **Children's rights: Civil and political rights**

### **Who is a child?**

- 1 Who is a child? When does one cease to be a child?
- 2 Who is an adult? When does one become an adult?
- 3 What ceremonies are celebrated at the birth of a child?
- 4 Are there any ceremonies to mark the transition from childhood to adulthood?
- 5 What status does a child have in the family? In the community?
- 6 Is the child's status a right that can be claimed or protected?
- 7 What are the most important values that children should be taught when growing up?
- 8 Are there any differences in the status of boy-children or girl-children?
- 9 If this is the case, why is there differentiation?
- 10 Does it matter if the child's father and mother are not married to each other?
- 11 What rights and duties do the parents have towards the child? How about the family? The community?



12 Is there anything else I need to ask?

### **Non-discrimination**

- 1 What constitutes discrimination?
- 2 Is there discrimination against children?
- 3 Is such discrimination condoned?
- 4 Are boys and girls treated equally? Do they have the same opportunities?
- 5 If not, why are they treated differently?
- 6 Does it matter if a child's parents are married to each other?
- 7 How about factors such as disability, fortune, etc?
- 8 Does discrimination on any of these grounds affect a child's opportunities as it grows up and later in life?
- 9 Are there any indigenous laws that proscribe discrimination?
- 10 Are these rules enforced? By whom? How?
- 11 Have I forgotten to ask anything? Is there anything you would like to ask me?

### **Participation**

- 1 Do you think children are capable of forming intelligent views on various issues that affect them?
- 2 Are children's views sought in matters that involve them?
- 3 Do parents and guardians seek and listen to the views of their children?
- 4 Are children's views taken into account when parents or guardians make decisions regarding them?
- 5 What factors influences the decision to take into account a child's opinion?
- 6 Does it matter if the child is a boy or a girl?
- 7 What channels of communication are used to gather children's views?
- 8 Are these channels effective nowadays?
- 9 Is it considered rude for a child to ask that his or her views be taken into account?
- 10 Have I forgotten to ask anything?

## **Survival and development**

- 1 Does the child have a right to life?
- 2 Who is responsible for the child's welfare and wellbeing?
- 3 Does it matter if the child is born out of wedlock? Who is the caregiver in this case?
- 4 What is the role of the family in bringing up the child? The community?
- 5 What processes are there to ensure the child's cultural as well as spiritual development?
- 6 Do traditional values matter in the context of the child's upbringing?
- 7 Do these values help the child's development?
- 8 Have I forgotten to ask anything? Do you want to ask me anything?

## **Right to a name**

- 1 My name is Thoko. Sometimes ma or papa calls me Baba. What is your name?  
That's a beautiful name. What does it mean?
- 2 Who gave you your name? Who chooses the child's name?
- 3 What is the philosophical foundation for a name?
- 4 What are the reasons for giving a child a particular name?
- 5 Are there different names for boys or girls?
- 6 Does a child's name have any bearing on that child's future prospects?
- 7 What surname does a child take? Is it the father's or the mother's?
- 8 Does the mother have to change her name to that of her husband?
- 9 Are surnames a creation of indigenous law?
- 10 Does the child have a name which is used at home and another one used at school? If yes, why is this the case?
- 11 Is there anything else that I have forgotten to ask?

## **The right to freedom of expression, association, thought, conscience and religion and the right to privacy**

- 1 Does the child have a right to talk about things that concern them freely?
- 2 Are there ways or processes that allow the child to freely talk about their problems or issues that affect them?
- 3 Is it considered rude for a child to say what he or she feels?
- 4 How much control do parents have over children in respect of choices that they make regarding church, politics, football etc?
- 5 Do children have a right to choose their religion?
- 6 Do you think children should have a right to choose their religion? Why? Why not?
- 7 How important is it for parents and children to belong to the same denomination?
- 8 If yes, whose denomination should it be? The mother's or the father's?
- 9 Do children have a right to their privacy?
- 10 How does this affect parents' or guardians' right to exercise reasonable supervision over their children?
- 11 Have I forgotten to ask anything else?

## **Disability**

- 1 What are the causes or explanations of disability? Are the disabled children or their parents blamed for the disability?
- 2 What factors make the lives of disabled children even more difficult? What factors make it easier?
- 3 Do disabled children have special rights over and above those that are not disabled?
- 4 If this is the case, what are those rights?
- 5 Are disabled children discriminated against? If so, should this be stopped and why?
- 6 Do disabled children receive special training or attend special schools?

- 7 Are disabled children excluded from certain events or prevented from doing certain things? What things are they not able to do?
- 8 There was once a minister who was disabled. Do you remember him? What did his appointment say about disabled children?
- 9 Is there anything else you would like to tell me?

### **Protection from abuse**

- 1 What constitutes child labour?
- 2 Are children required to work at home and in the field?
- 3 Is it the duty of a child to help the parents?
- 4 What is the reason for requiring children to work?
- 5 What kind of work is suitable for children? Are there activities which children should not be required to undertake?
- 6 What happens when such work interferes with the child's right to play or his or her education?
- 7 Do children from this village go and work in other people's homes and gardens?
- 8 Do these children get such jobs out of their own choice? Why do children seek this sort of employment? What has been the impact of HIV/AIDS in this regard?
- 9 Are such children looked after well? Do they go to school?
- 10 Do you know any child who is employed in this manner?
- 11 Have you heard of any laws that proscribe child labour?
- 12 To what extent should these laws be applicable within the family context?
- 13 Is there prostitution in this village? How does one ask this question?
- 14 Are girls from this village involved?
- 15 Why is there prostitution here?
- 16 What sort of people avail themselves to the services of prostitutes?
- 17 Are people aware that prostitution increases the likelihood of HIV/AIDS infections?
- 18 Are there reports of sexual abuse or rapes committed against children in this village?

- 19 How are children protected from such circumstances? What is the role of indigenous law in cases of child sexual abuse?
- 20 Do I need to know anything else relating to child abuse or child labour?

### **Protection from harmful practices**

- 1 Do boys and girls undergo initiation ceremonies?
- 2 What happens during the initiation ceremonies of boys? Of girls?
- 3 Does initiation involve some things that are not normally talked about?
- 4 Why such issues are not normally discussed?
- 5 Does initiation involve any practices that are prejudicial to the health or life of the child?
- 6 Do you think some aspects of initiation rites for boys or girls should be reconsidered?
- 7 How does one go about doing this?
- 8 What is the appropriate age of marriage for boys? For girls?
- 9 Are there any indigenous laws that prescribe the age of marriage for boys and girls?
- 10 Is there a problem if a girl remains unmarried? What is the explanation for this?
- 11 Is there a problem if a boy remains unmarried? (If there is a different answer, ask why is there such difference)
- 12 Do girls and boys have a right to choose who their partners should be?
- 13 What factors influence the choice of a prospective husband or wife?
- 14 What happens when someone refuses the person who has been chosen for them?
- 15 Does indigenous law allow parents or guardians to force someone to accept a marriage partner?
- 16 Are you aware of laws that prohibit forcing a marriage partner upon someone? Are the laws fair or unfair?
- 17 Is there anything else I need to ask?

## **Children's rights: Socio-economic and cultural rights**

### **Education**

- 1 What is the purpose of education?
- 2 Is it important for a child to go to school?
- 3 What things do you think children should be taught in schools? Should they be taught about sexuality, HIV/AIDS?
- 4 Who deserves to go school most, boys or girls?
- 5 (If there is differentiation) Why is it different for boys or girls?
- 6 What is more important, for a child to help with work around the house or to go to school?
- 7 What problems do school-going children face?
- 8 How do you think some of these problems may be resolved?
- 9 Are there differences between boys and girls regarding problems faced?
- 10 Should a girl who has gotten pregnant outside of marriage continue with her education? (If not, why not)
- 11 Does sending children to religious schools interfere with the children's right to freedom of religion?
- 12 Should children have a say regarding the school they are sent to?
- 13 Do you consult your children regarding educational choices?
- 14 Is corporal punishment administered in schools?
- 15 Do you think corporal punishment should be allowed in schools? How about at home?
- 16 Do you know of laws that prohibit corporal punishment in schools?
- 17 Do you think these laws are fair or unfair?
- 18 Have you ever discussed corporal punishment with your own children? What are their views in this regard?
- 19 Do you think there are alternatives to corporal punishment?
- 20 Is there anything else I need to ask?

## **Health, nutrition, reproductive rights, HIV/AIDS**

- 1      What health problems do children face?
- 2      What is the role of poverty in children's health status?
- 3      Who should be responsible for children's health?
- 4      Are issues related to primary health care, HIV/AIDS and nutrition taught in schools?
- 5      Do you discuss issues related to primary health care, HIV/AIDS and nutrition with children at home?
- 6      What have you heard regarding HIV/AIDS from the radio or from social workers?
- 7      Do you know anyone who has died or is suffering from HIV/AIDS? How do you ask a question such as this one?
- 8      What is the impact of HIV/AIDS on children?
- 9      Is there a significant number of orphans in this village?
- 10     Do these children receive adequate care? Who looks after them?
- 11     Under indigenous law, who is supposed to look after orphans? Does this happen in actual practice?
- 12     What does indigenous law and practice say about reproductive rights?
- 13     Who teaches children regarding reproductive rights and sexuality?
- 14     Have you discussed with your children issues related to sexuality, sex, and reproduction? Why (not)?
- 15     Is there anything else I need to ask?

## **Leisure, recreation and cultural activities**

- 1      Do children have a right to play?
- 2      Are children encouraged to go out and play and be children or are they encouraged to be more like adults?
- 3      Is the child who likes to go out and play considered naughty and unhelpful?
- 4      Do you think it is important that children should be given time to just be what they are, children?

- 5 What is the importance of play in a child's development?
- 6 Is corporal punishment administered for playing too much? Is this an aspect of cultural practice or family preference?
- 7 Are children encouraged to take part in cultural activities?
- 8 What sorts of leisure or cultural activities are children encouraged to undertake?
- 9 Is there anything else that I need to ask? Would you like to ask me a question?

### **Supplementary questions for little ones**

#### **General questions**

- 1 What is your name? You have a beautiful name.
- 2 Who are your guardians?
- 3 Do you have brothers and sisters?
- 4 Do you have many friends? What are their names?
- 5 Do you go to school? Is it important to go to school?
- 6 Do you always do your home work?
- 7 What do you want to be when you grow up?
- 8 Are you a naughty child?
- 9 Does Mama or Papa smack you when you are naughty?
- 10 Do you think Mama or Papa should smack you?
- 11 Do you help around the house? What kind of work do you do?
- 12 Do you like to play? What kind of games do you like to play?

#### **For girls**

- 1 Are you a virtuous girl? Do you help Mama with household chores? What else do you do at home?
- 2 What is special about girls? What is special about you?
- 3 Do you have any brothers or sisters? Are they older or younger than you?



- 4 Do your brothers help you around the house? Your sisters?
- 5 Are you and your brothers treated the same way at home? (If there are differences) Why do you think you are treated differently from them?
- 6 Do you think girls in Malawi have got the same opportunities as boys? Why do you think so?
- 7 What kind of problems do Malawian girls face? Are these problems the same for girls that live in the village and for those that live in town?
- 8 Do you go to school? What do you like about going to school?
- 9 Should girls be encouraged to go to school? Why?
- 10 What do you want to be when you grow up? A lawyer like me?
- 11 Do the teachers teach about the rights of a child? What have you heard about the right of a child?
- 12 Is there anything that you think is important for girls that should be taught at school but is not currently taught?
- 13 What do you know about HIV/AIDS?
- 14 To what extent does HIV/AIDS affect girls?
- 15 Is there anything else I need to know about Malawian or Lomwe girls?

### **For boys**

- 1 What is your name? Who gave you that name? It's a nice name.
- 2 Do you go to school? What do you like most about going to school?
- 3 What kind of things are you taught at school?
- 4 What are you going to be when you grow up? A lawyer perhaps?
- 5 Are you taught about the rights of the child at school? What have you been taught?
- 6 Is there anything that you are not taught in school that you think ought to be taught?
- 7 Do you listen to the radio sometimes? What have you heard on the radio? Have you heard about the rights of the child on the radio? What have you heard in this regard?

- 8 Do you help around the house? What kind of things do you do?
- 9 Do you think boys should also help with washing plates or fetching water? Why (Why not)?
- 10 Do you think girls and boys are treated the same, whether at school or at home?
- 11 What have you heard about HIV/AIDS?
- 12 Why should boys learn about HIV and AIDS?
- 13 Is there anything else you would like me to ask about?

### **Questions for focus groups**

- 1 Compose an essay about being a child in Malawi.
- 2 Why is it important for girls to go to school?
- 3 What problems do Malawian children face?
- 4 Why should parents listen to their children?
- 5 Should parents smack their children?

### **Questionnaire for organisations engaged in rights and development work**

#### **General**

- 1 What is the name of your organisation?
- 2 Please describe the kind of work are you involved in?
- 3 What are the needs of Malawian children?
- 4 How do you market the activities of your organisation to potential beneficiaries?
- 5 How are your activities funded?
- 6 What is the relationship between your organisation and your sponsors?
- 7 Do you get any assistance from the government?
- 8 If yes, what kind of support does the government give your organisation?
- 9 If no, do you need any support from the government and what kind of support should that be?

- 10 Do you have any interactive partnerships with other organisations involved in children's rights work?
- 11 If yes, are such partnerships beneficial to your work or a distraction on your goals?
- 12 What is the role of children's rights in your work?
- 13 Do you think government policy relating to children is sufficient to protect the rights and needs of Malawian children?
- 14 Would more legislation on children's rights benefit your activities? What kind of legislation would you suggest?

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